

(27,903)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 546.

MAX W. STOEHR, SUING IN HIS OWN BEHALF AS A
STOCKHOLDER IN STOEHR & SONS, INC., AND IN
BEHALF OF ALL OTHERS SIMILARLY SITUATED,
APPELLANTS,

vs.

JAMES N. WALLACE ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

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District Court of the United States for the Southern District of New York.

No. 2.

MAX W. STOHR, Suing in His Own Behalf as a Stockholder in Stoehr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE et al., Defendants.

Bill of Complaint.

Valentine Taylor, Solicitor for Complainant, No. 52 Wall Street, Borough of Manhattan, New York City.

Louis Marshall, Louis J. Vorhaus, of Counsel.

U. S. District Court, S. D. of N. Y. Filed Dec. 2, 1918.

3 In the District Court of the United States for the Southern District of New York.

No. 2.

MAX W. STOHR, Suing in His Own Behalf as a Stockholder in Stoehr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE, THOMAS PREHN, FERDINAND KUHN, ANDREW B. Duvall, Walter S. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney, Richard Stockton, A. Mitchell Palmer, Individually and as Alien Property Custodian; Stoehr & Sons, Inc., Botany Worsted Mills, Francis P. Garvan, and Paul Kiefer, Defendants.

Bill of Complaint.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The complainant Max W. Stoehr, suing in his own behalf as a stockholder of Stoehr & Sons, Inc., and in behalf of all others similarly situated who may come in and join in this proceeding and share in the expenses thereof, brings this his Bill of Complaint against the above-named defendants and respectfully shows to the Court:

4

First. Max W. Stoehr is and ever since 1910 has been a citizen of the United States and of the State of New York and an actual resident in the City and County of New York, in said State. The defendant A. Mitchell Palmer is a citizen and resident of the City of Stroudsburg, State of Pennsylvania. He now is, and at all of the times hereinafter mentioned was, the Alien Property Custodian, having been duly appointed to such office pursuant to the Act of Congress approved October 6, 1917, and known as the "Trading with the Enemy Act." The defendant Stoehr & Sons, Inc., is and ever since February 17, 1917, has been a corporation duly organized by and under the laws of the State of New York. The defendant Botany Worsted Mills is and ever since May 11, 1899, has been a corporation duly organized by and under the laws of the State of New Jersey. The defendants James N. Wallace, Thomas Prehn, Ferdinand Kuhn, Andrew B. Duvall, Walter S. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, W. J. Hellmer, Richard Stockton and H. C. MacEldowney are now acting as the directors of the Botany Worsted Mills, and the defendants James N. Wallace, Francis P. Garvan, Andrew B. Duvall and Paul Kieffer are now acting as the directors of Stoehr & Sons, Inc.

Second. The jurisdiction of this court is invoked under Sections 24 and 57 of the Federal Judicial Code, under the Act of Congress known as "Trading with the Enemy Act," as amended, and also under the provisions of the Constitution of the United States, and particularly the Fifth Amendment thereto, the rights of complainant and of the defendant Stoehr & Sons, Inc., and its stockholders
5 having been wrongfully, unlawfully and without due process of law invaded by the defendants herein, under color of the aforesaid "Trading with the Enemy Act," and in violation of the clause of the Fifth Amendment to the Constitution of the United States, which guarantees that no person shall be deprived of life, liberty or property without due process of law.

Third. Since February 17, 1917, complainant has continuously been, and now is, the lawful owner and holder of record of forty-four (44) shares of the capital stock of the defendant Stoehr & Sons, Inc. Neither he nor the defendant Stoehr & Sons, Inc., is or at any time has been an enemy or the ally of any enemy of the United States within the meaning of such terms as used and defined in the "Trading with the Enemy Act," or in any way whatsoever, but they have been at all times faithful to their allegiance and loyal to the United States; nor has the complainant at any time since April 6, 1917, done business with any enemy or the ally of any enemy of the United States or been outside of the territory of the United States, nor has the defendant Stoehr & Sons, Inc., since that time done any business with any enemy or the ally of any enemy of the United States.

Fourth. The capital stock of the defendant Stoehr & Sons, Inc., incorporated as hereinbefore set forth, is Two Hundred and Fifty Thousand (\$250,000) Dollars, consisting of Two Thousand Five

Hundred (2,500) shares of the par value of One Hundred (\$100) Dollars each.

Fifth. The capital stock of the defendant Botany Worsted Mills is Three Million Six Hundred Thousand Dollars (\$3,600,000) and consists of Thirty-six Thousand (36,000) shares of the par value of One Hundred (\$100) Dollars each. Ever since its incorporation it has been, and now is, engaged in the business of manufacturing woolen and worsted cloths and yarns.

Sixth. On or about February 19, 1917, the defendant Stoeck & Sons, Inc., became, ever since has been and now is the true and lawful owner of Five Thousand Six Hundred and Ninety (5,690) shares of the capital stock of the defendant Botany Worsted Mills.

Seventh. In or about the latter part of the year 1914 Kammgarnspinnerei Stoeck & Co., Actiengesellschaft of Plagwitz, Leipzig, Germany, the owner in fact and of record of Fourteen Thousand Nine Hundred (14,900) shares of the capital stock of the defendant Botany Worsted Mills, caused to be transferred on the books of said Company Fourteen Thousand Nine Hundred (14,900) shares of the capital stock of the defendant Botany Worsted Mills in trust for said beneficial owner of the same as to Ten Thousand (10,000) shares thereof to Hans E. Stoeck and as to Four Thousand Nine Hundred (4,900) shares thereof to the complainant herein. Thereupon, on February 20, 1917, an agreement was duly made and entered into between the aforesaid beneficial owner of said Fourteen Thousand Nine Hundred (14,900) shares aforesaid, Kammgarnspinnerei Stoeck & Co., Actiengesellschaft, and the defendant Stoeck & Sons, Inc., a copy of which agreement is hereto attached, marked Complainant's Exhibit I, and made a part hereof. Pursuant to the terms of such agreement the complainant and Hans E. Stoeck as trustees duly transferred to the defendant Stoeck & Sons, Inc., said 14,900 shares of the capital stock of the Botany Worsted Mills. By the terms of the contract the beneficial owner agreed to sell and transfer to defendant Stoeck & Sons, Inc., and the latter agreed to purchase from the Trustees the aforesaid Fourteen Thousand Nine Hundred (14,900) shares of the capital stock of the defendant Botany Worsted Mills, and to pay therefor their book value; and in part performance of such contract the defendant Stoeck & Sons, Inc., duly paid to the vendor of said shares the sum of Five Thousand (\$5,000) dollars. Thereupon the defendant Stoeck & Sons, Inc., on February 20, 1917, became and has ever since been and now is the lawful owner of and vested with the title to said Fourteen Thousand Nine Hundred (14,900) shares of the capital stock of the defendant, Botany Worsted Mills.

Eighth. By reason of the premises complainant, as a stockholder of the defendant, Stoeck & Sons, Inc., has an equitable interest to the extent of the shares of stock held by him in the said Five Thousand Nine Hundred and Sixty (5,960) shares of stock owned by said Stoeck & Sons, Inc., in the said defendant, Botany Worsted Mills,

and also in the aforesaid Fourteen Thousand Nine Hundred (14,900) shares of the capital stock of said Botany Worsted Mills, hereinbefore referred to.

Ninth. On April 6, 1917, the United States of America declared war against the Empire of Germany, and on December 7, 1917, against the Empire of Austro-Hungary, and thereafter continued to be actually engaged in such war until November 11, 1918, when hostilities were ended by the terms of an armistice duly adopted and on that day officially promulgated by the President of the United States.

Tenth. On and about the 20th day of March, 1918, the defendant, A. Mitchell Palmer, assuming to act as Alien Property Custodian, under the act of Congress of October 6th, 1917, known as
8 "Trading with the Enemy Act," wrongfully, unlawfully, forcibly and without due process of law, and in violation of the Fifth Amendment to the Constitution of the United States, took possession of certain mills, personal property and appurtenances owned by the defendants Stoehr & Sons, Inc., and Botany Worsted Mills, at Passaic, in the State of New Jersey, and of all the other assets and personal property of the said defendants within the United States, and of the books of account and other books, papers and muniments of title of said corporations, and he further claims as such Alien Property Custodian to have acquired the right of possession of and to have seized the shares of stock of the defendant, Botany Worsted Mills, of which the defendant, Stoehr & Sons, Inc., is the owner.

Eleventh. Pursuant to such seizure and acting under color of the "Trading with the Enemy Act," the defendant, A. Mitchell Palmer, as the Alien Property Custodian, caused the duly elected and then acting Directors of the defendants, Botany Worsted Mills and Stoehr & Sons, Inc., to be removed, and to be in their place and stead put into office as the directors of Botany Worsted Mills the defendants, James N. Wallace, Thomas Prehn, Ferdinand Kuhn, Andrew B. Duvall, Walter S. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney and Richard Stockton and as the directors of Stoehr & Sons, Inc., the defendants Francis P. Garvan, Andrew B. Duvall, the said James N. Wallace and Paul Kieffer, all of whom are now acting as directors of the respective corporations for which they have been designated to act as such.

Twelfth. On information and belief, complainant avers that the defendant, A. Mitchell Palmer, as Alien Property Custodian,
9 has directed the defendants who now are the acting Directors of said Botany Worsted Mills to issue to him, as Alien Property Custodian, certificates of stock for the aforesaid Twenty Thousand Five Hundred and Ninety (20,590) shares of the capital stock of the Botany Worsted Mills owned by defendant, Stoehr & Sons, Inc., and said Defendant-Directors of the Botany Worsted Mills are about to issue to the Alien Property Custodian certificates for

said shares of stock unless restrained by an injunction from this Honorable Court.

Thirteenth. The defendant, A. Mitchell Palmer, as Alien Property Custodian, through the Directors put in and designated by him of the defendants Botany Worsted Mills and Stoeck & Sons, Inc., has assumed possession and control of the properties and property rights of the said corporations which he claims to have seized, and asserting such possession and control, the defendant, A. Mitchell Palmer, and the Defendant-Directors of the said corporations have refused and are refusing in any wise to recognize the rights or authority of those who were officers, directors and stockholders of said corporations at the time when he undertook the possession and control thereof, and the said defendants are continuing in the possession and control of said property thus taken and seized, and in the operation of the business and affairs of the defendants Botany Worsted Mills and Stoeck & Sons, Inc., all of which are being conducted without lawful right or authority and without any pretense of right, excepting such as is unlawfully claimed by the Alien Property Custodian under color of the "Trading with the Enemy Act."

Fourteenth. On information and belief, complainant further states that on or about the 20th day of March, 1918, when
10 the defendant, A. Mitchell Palmer, as Alien Property Custodian, took over the control of the defendant Botany Worsted Mills, that corporation was and now is in every respect solvent; that its assets were and are of the value of upwards of Twenty-five Million Dollars; that it had on hand a surplus and reserve fund of Eleven Million Three Hundred and Sixty-eight Thousand Four Hundred and Twenty-seven and 40/100 (\$11,368,427.40) dollars, of which the defendant, Palmer, as Alien Property Custodian, took possession; that on the same day when the said Alien Property Custodian assumed control of the defendant, Stoeck & Sons, Inc., that Company was and has ever since been solvent, having on hand an undivided surplus and securities amounting approximately to One Million Three Hundred and Ninety Thousand and Seven Hundred and Thirty-eight and 42/100 (\$1,390,738.42) dollars; that neither of said corporations possessed or dealt in perishable property; that when the defendant, the Alien Property Custodian, took over their assets, it was not necessary, nor has it at any time since been necessary, to sell the assets of either of said corporations so taken over by the said Alien Property Custodian, for the purpose of preventing waste or to protect property of said corporations or either of them or the rights of any person who might ultimately become entitled thereto or to the benefit thereof; that it is not necessary for the preservation of the interests of the owner of the shares of stock of the Botany Worsted Mills or of the defendant Stoeck & Sons, Inc., or the value of said shares that they be sold or disposed of at this time; that nevertheless, the defendant, Palmer, as Alien Property Custodian, in violation of the Fifth Amendment to the Constitution of the United States, and without due process of law, and in violation of Section 12 of

11 said "Trading with the Enemy Act," on or about the 2nd day of November, 1918, and many times since that day, advertised in the daily newspapers of New York City and otherwise, and wrongfully, unlawfully, without due process of law, and without authority of law, to advertise and offered for sale Twenty-Four Thousand Four Hundred and Ten (24,410) shares of stock of said Botany Worsted Mills, which include the 20,590 shares of stock of said company, owned by the defendant, Stoehr & Sons, Inc., such sale to take place on December 2nd, 1918 (which sale has now been postponed until December 17, 1918), and proposes, in violation of the terms of the "Trading with the Enemy Act" and of the aforesaid provision of the Constitution of the United States, to sell all of said shares of stock without due process of law and without giving to Stoehr & Sons, Inc., or to the complainant, or to the stockholders of said corporation, notice or an opportunity to be heard in any judicial proceedings looking to the condemnation, sale or disposition of said shares of stock, and proposes by and through the sale so advertised to deprive the defendant, Stoehr & Sons, Inc., and the complainant and the other stockholders of said corporation of their interest and ownership in the shares of stock of the Botany Worsted Mills belonging to Stoehr & Sons, Inc., and to deprive them of their ownership and their legal and equitable interests in said shares of stock and of their property therein and to substitute for their property and property rights in said shares of stock such sum as may be realized at such proposed sale for such shares as the net proceeds received therefor, to the great and irreparable injury which will thereby be sustained by the defendant, Stoehr & Sons, Inc., the complainant and the other stockholders of said corporation.

Fifteenth. The defendant, the Alien Property Custodian, has published, circulated and issued the terms and conditions on which he proposes to sell the shares of stock so advertised by him.
12 among which terms are the following, to wit: that such property will be sold only to an American citizen or citizens, or to a corporation incorporated within and under the authority of the laws of a state or territory of the United States or any of its insular possessions; but the Alien Property Custodian shall have the right to exclude from bidding at any such sale and/or from purchasing or otherwise acquiring the above described property, any corporation which he shall, after investigation, determine to be controlled, managed or operated, wholly or mainly, by or for the account or benefit of a person or persons not a citizen of the United States or of its insular possessions; that the Alien Property Custodian and one of his appointees known as the Director of the Bureau of Sales acting for and under him, shall have the right to require, either before or after any bidding or acceptance of any bid, evidence that the bidder is qualified as above provided, to bid for and purchase said property; and also, that no inspection of the plant will be allowed except upon written order from said Director of Sales, to be given only to those (a) who have qualified as bidders, or (b) who shall have deposited with said Director of Sales a certified check for

Twenty-five Thousand (\$25,000.00) dollars, said deposit to be returned upon the qualification of said person as a bidder, in the event such person shall so qualify; otherwise as soon as practicable after the sale; and the terms and conditions of sale are in other respects, unreasonable and onerous. The shares of the Botany Worsted Mills are not listed on any stock exchange, and a sale of what constitutes practically two-thirds of all of its shares at a single forced sale, will inevitably result in the realization of but a small part of their fair and true value. There can be but limited competition at
13 such a sale. No market value exists for the shares of stock proposed to be sold. A sale of so large a proportion of the entire capital stock of the Company at one time will necessarily result in the sacrifice of the shares proposed to be sold.

Complainant further charges that said terms and conditions of sale as promulgated by said defendant, Alien Property Custodian, are unreasonable and are injurious to the interest of said companies and the stockholders thereof, in which complainant has an interest as a stockholder in Stoehr & Sons, Inc., as aforesaid; that the defendant, the Alien Property Custodian, has in effect prohibited all persons and corporations who are the citizens or subjects of the several nations of the world with whom the United States is at peace and has commercial treaties which are referred to in paragraph Seventeenth hereof, and whom the United States has recognized as favored nations to be dealt with on an equality with American citizens in the matter of acquiring property within the United States, from lawfully bidding for and acquiring the shares of stock of the Botany Worsted Mills proposed to be sold, that as a result of said action by the defendant, the Alien Property Custodian, the number of the prospective purchasers will be materially reduced and the proposed sale will necessarily result in the undue sacrifice of the property and property rights of the defendant, Stoehr & Sons, Inc., and of the complainant and the other stockholders of that corporation in such shares of stock, to the great and irreparable injury of the complainant and the stockholders of the defendant, Stoehr & Sons, Inc., and of said corporation as the owner of the shares so proposed to be sold.

And your orator further charges, and he verily believes, that unless the sale so advertised by the said Alien Property Custodian is
14 restrained by a preliminary injunction issued by this Honorable Court, that the said Alien Property Custodian will proceed with said sale so advertised by him on December
17, 1918, or on the day to which such sale may be postponed.

Sixteenth. The proposed sale by the Said Alien Property Custodian of the Twenty Thousand Five Hundred and Ninety (20,590) shares of the capital stock of the Botany Worsted Mills owned by Stoehr & Sons, Inc., is illegal, unwarranted, and in violation of the constitutional rights of complainant and the other stockholders of Stoehr & Sons, Inc., and of that corporation, because it is a domestic corporation and is not an enemy alien, within the meaning of the "Trading with the Enemy Act," because no emergency exists such as is set forth in Section 12 of the said "Trading with the Enemy

Act," which would authorize the said Alien Property Custodian to sell such property because it will be in excess of the powers and duties of the Alien Property Custodian, in this, that such sale is not necessary to prevent waste or to protect such property within the meaning of Section 12 of said "Trading with the Enemy Act" and because it would deprive complainant and the other stockholders of Stoehr & Sons, Inc., and that corporation of their property and property rights without due or any process of law, in violation of the Fifth Amendment to the Constitution of the United States.

Seventeenth. On information and belief, complainant alleges and so states the fact to be that Section 12 of said act of Congress, known as "Trading with the Enemy Act," and the amendments thereto approved, March 28, 1918, and November 12, 1918, and Subsection c of Section 7 of "Trading with the Enemy Act," as amended, in so

15 far as the provisions of said sections purport to authorize the taking of property by a summary and ex parte order without due process of law, are unconstitutional and are in violation of the Fifth Amendment to the Constitution of the United States, providing that: "Nor shall any person be deprived of life, liberty or property without due process of law." In so far as said amendment to said Section 12 of the "Trading with the Enemy Act" restricts the sale of shares, stock or property designated therein, the same is unconstitutional and in contravention of the following treaties, to wit:

Treaty of Commerce and Navigation between United States and Belgium, concluded March 8, 1875, duly ratified by the Senate of the United States, March 16, 1875, and proclaimed by the President June 29, 1875, article I of which treaty is as follows:

"There shall be full and entire freedom of commerce and navigation between the inhabitants of the two countries, and the same security and protection which is enjoyed by the citizens or subjects of each country shall be guaranteed on both sides. The said inhabitants, whether established or temporarily residing within any ports, cities or places whatever of the two countries, shall not, on account of their commerce or industry, pay any other or higher duties, taxes or imports than those which shall be levied on citizens or subjects of the country in which they may be; and the privileges, immunities and other favors, with regard to commerce or industry, enjoyed by the citizens or subjects of one of the two States, shall be common to those of the other."

16 The treaty of Commerce and Peace between the United States and Italy, concluded February 26, 1871, duly ratified and proclaimed by the President on November 23, 1871, article I of which is as follows:

"There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation.

"Italian citizens in the United States, and citizens of the United States in Italy, shall mutually have liberty to enter with their ships

and cargoes all the ports of the United States and of Italy, respectively, which may be open to foreign commerce. They shall also have liberty to sojourn and reside in all parts whatever of said territories. They shall enjoy, respectively, within the States and possessions of each party, the same rights, privileges, favors, immunities, and exemptions for their commerce and navigation as the natives of the country wherein they reside, without paying other or higher duties or charges than are paid by the natives, on condition of their submitting to the laws and ordinances there prevailing.

"War vessels of the two Powers shall receive in their respective ports the treatment of those of the most favored nation."

The treaty of Peace, Commerce and Navigation between the United States and the French Republic, concluded September 30, 1800, duly ratified and proclaimed by the President on December 21, 1801, article XI of which is as follows:

"The citizens of the French Republic shall pay in the ports, havens, roads, countries, islands, cities, and towns of the United States, no other or greater duties or imposts, of what nature soever they may be, or by what name soever called, than those which
17 the nation most favored are or shall be obliged to pay; and they shall enjoy all the rights, liberties, privileges, immunities, and exemptions in trade, navigation, and commerce, whether in passing from one port in the said State to another, or in going to and from the same from and to any part of the world, which the said nations do or shall enjoy. And the citizens of the United States shall reciprocally enjoy, in the territories of the French Republic in Europe, the same privileges and immunities, as well for their property and persons as for what concerns trade, navigation, and commerce."

The treaty of Commerce and Navigation between the United States and Great Britain, concluded July 3, 1815, duly ratified and proclaimed by the President on December 22, 1815, article I of which is as follows:

"There shall be between the territories of the United States of America, and all the territories of His Britannic Majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively."

18 Treaty of Commerce and Navigation between the United States and the Republic of Liberia, concluded October 21, 1862, duly ratified and proclaimed by the President on March 18, 1863, article II of which is as follows:

"There shall be reciprocal freedom of commerce between the United States of America and the Republic of Liberia. The citizens of the United States of America may reside in and trade to any part of the territories of the Republic of Liberia to which any other foreigners are or shall be admitted. They shall enjoy full protection for their persons and properties; they shall be allowed to buy from and to sell to whom they like, without being restrained or prejudiced by any monopoly, contract, or exclusive privilege of sale or purchase whatever; and they shall, moreover, enjoy all other rights and privileges which are or may be granted, to any other foreigners, subjects, or citizens of the most favored nation. The citizens of the Republic of Liberia shall, in return, enjoy similar protection and privilege in the United States of America and in their territories."

The treaty of Friendship, Commerce and Navigation between the United States and the Republic of Honduras, concluded July 4, 1864, article III of which is as follows:

"It being the intention of the two high contracting parties to bind themselves by the preceding articles, to treat each other on the footing of the most favored nation, it is hereby agreed between them that any favor, privilege, or immunity whatever, in matters of commerce and navigation, which either contracting party has actually granted, or may hereafter grant, to the subjects or citizens of any other State, shall be extended to the subjects or citizens of the other high contracting party gratuitously, if the concession in favor of that other nation shall have been gratuitous; or in return for a compensation as nearly as possible of proportionate value and effect, to be adjusted by mutual agreement, if the concession shall have been conditional."

The treaty of Friendship, Commerce and Navigation between the United States and Denmark, concluded April 26, 1826, duly ratified and proclaimed by the President on October 14, 1826, article II of which is as follows:

"The contracting parties being likewise desirous of placing the commerce and navigation of their respective countries on the liberal basis of perfect equality and reciprocity, mutually agree that the citizens and subjects of each may frequent all the coasts and countries of the other, (with the exception hereafter provided for in the sixth article,) and reside and trade there in all kinds of produce, manufactures and merchandise; and they shall enjoy all the rights, privileges and exemptions, in navigation and commerce, which native citizens or subjects do or shall enjoy, submitting themselves to the laws, decrees and usages there established, to which native

citizens or subjects are subjected. But it is understood that this article does not include the coasting trade of either country, the regulation of which is reserved by the parties, respectively, according to their own separate laws."

20 The treaty of Peace and Commerce between the United States and the republic of Peru, concluded August 31, 1887, duly ratified and proclaimed by the President on November 7, 1888, Article XV of which is as follows:

"The high contracting parties promise and engage to give full and perfect protection to the persons and property of the citizens of each other of all classes and occupations, who may be dwelling or transient in the territories subject to their respective jurisdiction; they shall have free and open access to the tribunals of justice for their judicial recourse, on the same terms as are usual and customary with the natives or citizens of the country in which they may be, and they shall be at liberty to employ, in all causes, the advocates, attorneys, notaries, or agents, of whatever description, whom they may think proper. The said citizens shall not be liable to imprisonment without formal commitment under a warrant signed by a legal authority, except in cases flagranti delicti; and they shall in all cases be brought before a magistrate or other legal authority for examination within twenty-four hours after arrest; and if not so examined, the accused shall forthwith be discharged from custody. Said citizens, when detained in prison, shall be treated, during their imprisonment, with humanity, and no unnecessary severity shall be exercised toward them."

The treaty of Commerce and Navigation between the United States and Portugal, concluded August 25, 1840, and proclaimed by the President April 24, 1841, Article I of which is as follows:

21 "There shall be, between the territories of the high contracting parties, a reciprocal liberty of commerce and navigation. The citizens and subjects of their respective States shall, mutually, have liberty to enter the ports, places, and rivers of the territories of each party, wherever foreign commerce is or shall be permitted. They shall be at liberty to sojourn and reside in all parts of said territories, in order to attend to their affairs; and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing, and particularly to the regulations in force concerning commerce."

Eighteenth. On November 20, 1918, complainant duly protested to the said Alien Property Custodian against the proposed sale of the shares of stock hereinbefore mentioned, a copy of which protest is herewith attached marked "Complainant's Exhibit No. II." On November 23, 1918, complainant duly filed with defendant, A. Mitchell Palmer, his notice of claim, under oath, under Section 9 of

said "Trading with the Enemy Act," a true copy of which is herewith attached, marked Complainant's Exhibit III and made a part hereof and made a part of this Bill of Complaint, but his protests have been ignored; that said Defendant-Directors of said Stoehr & Sons, Inc., are the creatures of and were nominated and elected by and through the orders of said defendant, A. Mitchell Palmer, as Alien Property Custodian, and to carry out his instructions, and that it would be useless to make a demand upon such Defendant-Directors to institute this suit, and for this reason he is obliged to appeal for relief to this Court.

Nineteenth. Unless a preliminary injunction duly issues in this case, the rights of complainant in the shares of stock of the said Botany Worsted Mills owned by Stoehr & Sons, Inc., and
 22 the right of the said Stoehr & Sons, Inc., in said Twenty Thousand Five Hundred and Ninety (20,590) shares of stock of the said Botany Worsted Mills, will be defeated and your orator will suffer irreparable injury incapable of being measured in damages in an action at law.

Twentieth. Forasmuch as complainant is without relief in the premises, except in a Court of Equity, and to the end that he may obtain the relief to which he is entitled in the premises, he now prays the Court to grant him due process by subpoena directed to A. Mitchell Palmer, as Alien Property Custodian, Stoehr & Sons, Inc., Botany Worsted Mills and Thomas Prehn, Ferdinand Kuhn, Andrew B. Duvall, Walter S. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney, James N. Wallace and Richard Stockton, as Directors of said Botany Worsted Mills, Francis P. Garvan, Andrew B. Duvall, Paul Kieffer and James N. Wallace, as Directors of said Stoehr & Sons, Inc., requiring and commanding them severally to appear herein and answer this Bill of Complaint, answer under oath being hereby expressly waived; that the cloud upon the title of the said shares of stock produced by the action of the aforesaid defendants in seizing said shares of stock and in advertising them for sale may be removed and the title to said shares of stock quieted; that the action of the said defendants as described in this bill of complaint may be declared illegal and in violation of the rights of your orator, and that said Act of Congress, known as "Trading with the Enemy Act" and the amendments thereto, may be held to be in contravention of the fifth amendment of the Constitution of the United States and as depriving complainant and defendant Stoehr & Sons, Inc., of his and its property without due process of law within the
 23 meaning of the said amendment of the Constitution of the United States, and that a preliminary injunction be issued enjoining and restraining the said defendants-directors from transferring said shares of stock to the name of the said Alien Property Custodian, and enjoining and restraining the said defendant, A. Mitchell Palmer, as Alien Property Custodian, from selling or offering for sale the Twenty Thousand Five Hundred and Ninety (20,-

590) shares of capital stock of the Botany Worsted Mills owned by Stoehr & Sons, Inc., and also from selling or offering for sale any shares of stock held by the said defendant, A. Mitchell Palmer, as Alien Property Custodian in the Botany Worsted Mills, and that upon a final hearing of the Bill that the said preliminary injunction be made permanent. Complainant further prays in the event that the sale of said stock, or any part thereof, is consummated during the pendency of this action, that said fact may be suggested to the Court by a supplemented bill, and that upon a final hearing of this action, such sale or sales, upon notice to the purchaser or purchasers thereof, shall be set aside, and that the defendants, severally and individually, may be directed to account to Stoehr & Sons, Inc., for all loss and damage which may be sustained by the said Stoehr & Sons, Inc., by reason of the wrongful acts herein complained of. And complainant further prays that defendant, A. Mitchell Palmer, as Alien Property Custodian, be ordered, adjudged and decreed to release and surrender all and singular the shares of stock of the defendant Botany Worsted Mills owned by defendant Stoehr & Sons, Inc., seized and taken by him as aforesaid, and to account for his acts in and about his attempted possession and control of such shares of stock and in and about the care and conduct of the said property, business and affairs of the said defendant corporations during the period of his possession thereof.

24 Your orator prays for such other and further relief as may be just and equitable.

MAX W. STOEHR,
Complainant.

VALENTINE TAYLOR,
Solicitor for Complainant.
52 Wall Street,
New York City.

LOUIS MARSHALL AND
LOUIS J. VORHAUS,
Of Counsel.

STATE OF NEW YORK,
County of New York, ss:

Max W. Stoehr, being first duly sworn, deposes and says that he is the complainant of the above-entitled cause; that the foregoing Bill of Complaint was duly read by him, and that he knows the contents thereof, and that the same is true, except as to those matters and things stated by him to be on information and belief, and as to those matters he believes same to be true.

MAX W. STOEHR.

Subscribed and sworn to before me this 2nd day of December, 1918.

SAMUEL K. ABRAHAMS,

Notary Public
in and for the County of Bronx.

Bronx Co. Clerk No. 24.
 Bronx County Register's No. 220.
 New York County Clerk's No. 168.
 New York County Register's No. 10149.
 Kings County Clerk's No. 15.
 Kings County Register's No. 157.
 Queens County Clerk's No. 1542.

25

EXHIBIT I.

Agreement made at Passaic in the State of New Jersey, on the 20th day of February, 1917, between Kammgarn-Spinnerei Stoehr & Co., Aktiengesellschaft of Plagwitz-Leipzig, Germany, hereinafter called the "Leipzig Company," party of the first part, and Stoehr & Sons, Inc., hereinafter called the "New York Company," party of the second part, witnesseth:

Whereas, the Leipzig Company is beneficially interested in Fourteen thousand nine hundred (14,900) shares of the capital stock of the Botany Worsted Mills, a New Jersey corporation, which said shares of stock are now standing in the name of Hans F. Stoehr and Max W. Stoehr and are represented by the following certificates, each certificate being for Five (5) shares of said stock:

No. 51 to 1050, No. 3441 to 3500, No. 4061 to 500, No. 1051 to 1400, No. 2001 to 2017, No. 2041 to 2060, No. 2151 to 2171, No. 2861 to 2884, No. 2890 to 2898, No. 3161 to 3260, No. 5251 to 5369, No. 5389 to 5411, No. 5451 to 5750;

and

Whereas, the Leipzig Company is desirous of selling and said New York Company is desirous of purchasing said interest on the terms and conditions hereinafter set forth,

Now therefore, in consideration of the premises and of Five thousand (\$5,000) Dollars paid by the New York Company to the Leipzig Company on account of the purchase price, the receipt whereof is hereby acknowledged, and in further consideration of the
 26 mutual promises of the parties as herein set forth, it is hereby agreed as follows:

First. The Leipzig Company hereby sells, assigns and transfers unto the New York Company all of its interest in said shares and said shares of stock shall be forthwith transferred upon the books of the Botany Worsted Mills and placed in the name of the said New York Company.

Second. The terms of the sale and the purchase price for said shares shall be determined as follows and paid in the following installments:

(a) The purchase price shall be determined by and shall be equal to the book value of said shares as shown by the books of the Botany Worsted Mills. The price shall be payable in five (5) installments, the first instalment being payable one year from date and the subse-

quent installments respectively in two, three, four and five years from date. From the last or fifth installment the sum of \$5,000, paid on account as hereinbefore recited with interest at six per cent from date shall be deducted.

(b) The first annual installment shall be based upon and shall be equal to the book value of said shares, as shown by the books of the Botany Worsted Mills according to the last previous closing of its books on November 30, 1917; and the four subsequent annual installments shall be similarly based upon and shall be equal to the book value of the shares as shown by the last previous closing of the books of the Botany Worsted Mills on the 30th of November preceding the falling due of each of said annual installments.

27 (c) In arriving at the amount of each installment for each of said years the net worth of the hard assets of the Botany Worsted Mills after deducting the total liabilities shall be taken as the basis for the computation of the value per share and no allowance or increase shall be made on such installment for good will.

(d) In addition to the book value of said shares there shall be taken into consideration and account the amount of the dividends received by the New York Company during the said five years from date in the following manner:

During the first year the amount of the entire dividends received by the New York Company on the said shares shall be added to the purchase price and shall be paid with the first installment; during the second year four-fifths of the entire dividends received on said shares of stock by the New York Company, during the third year three-fifths of said dividends, during the fourth year two-fifths of said dividends and during the fifth year one-fifth of said dividends so received on said shares shall be added to the annual installments of the purchase price and shall become part of said purchase price and shall be payable with each of said installments at the end of each of said respective years.

Third. That the certificates of stock for said Fourteen thousand nine hundred shares sold and transferred as hereinbefore provided shall be placed in the possession of the Leipzig Company as collateral security for the amount of the purchase price; but as each annual installment with said additions provided for in paragraph Second, Subdivision d, is paid the New York Company shall have the right to require the redelivery of, and the Leipzig Company will contemporaneously with the payment of each installment redeliver to the New York Company, one-fifth (1/5th) of said shares and thereupon the Leipzig Company shall continue to retain the remaining shares as collateral security for the balance of the purchase price still payable.

Fourth. The New York Company shall have the right at any time to require the deposit of the entire shares of stock or any balance thereof remaining in the hands of the Leipzig Company, with a bank or trust company to be selected by the Leipzig Company, such

deposit to be made with such bank or trust Company in escrow, to be held until the purchase price or the balance remaining unpaid shall have been fully paid or (in case of non-payment of any installment) until the Leipzig Company shall be entitled to said stock under the provisions of paragraph Fifth of this agreement.

Fifth. In the event that any of the said annual installments with said additions provided for in paragraph Second, sub-division d hereof, shall not be paid when due, then the Leipzig Company shall notify the New York Company in writing that it requires the payment of the installment then due together with the said additions and in the event that the New York Company shall not within sixty (60) days after said demand pay the said installment with the additions then the said shares of stock or any remaining balance of said stock shall be forthwith retransferred to the said Leipzig Company on the books of the Botany Worsted Mills and all rights on the

part of the New Jersey Company to said stock or any such
29 balance shall cease and the Leipzig Company shall retain the
Five thousand (\$5,000) dollars, paid on account as hereinbefore recited, in full settlement of any claim against the New York Company and thereupon neither of said companies shall have any further claim against the other arising under or by reason of this agreement; it being understood that the non-payment of any subsequent installment shall not affect the portion or portions of the stock which may have been fully paid for by a previous installment or installments.

In witness whereof the parties hereto have affixed their corporate signatures the day and year above written.

KAMMGARNSPINNEREI STOEHR & CO.,

Aktiengesellschaft,

By HANS E. STOEHR.

In the presence of

CARL ZIMMERMANN.

STOEHR & SONS, INC.,

By GEORG G. ROHLIG,

Vice President.

Attest:

MAX W. STOEHR,
Secretary.

30

EXHIBIT II.

Protest.

To the Honorable A. Mitchell Palmer,
Alien Property Custodian,
Washington, D. C.:

The undersigned, Max W. Stochr, an American citizen, and a bona fide stockholder of record of Forty-four (44) shares of stock of Stochr & Sons, Inc., a domestic corporation, organized under the laws of the State of New York, does hereby protest against the contemplated action by the Alien Property Custodian in advertising and offering for sale One Thousand Two Hundred and Ninety (1,290) shares of the capital stock of Botany Worsted Mills, a corporation duly organized under the laws of the State of New Jersey, owned by said Stochr & Sons, Inc.

The undersigned also protests against the proposed sale of 24,410 shares of the Botany Worsted Mills and 1,290 shares of stock of said company as advertised by you. Stochr & Sons, Inc., own 20,580 shares of said stock.

The grounds of this protest are as follows:

First. Your contemplated action of seiling and disposing of the said shares of stock of Stochr & Sons, Inc., and their interest therein is tantamount to taking property from said Stochr & Sons, Inc., and from this protestant and deprive him and it of property without due process of law, in violation of the 5th Amendment to the Constitution of the United States; that Section 12 of the "Trading with the Enemy Act" and the amendments thereto are unconstitutional, as depriving Stochr & Sons, Inc., and this protestant of property without due process of law, in violation of said 5th Amendment and in contravention with existing treaties with many nations with which the United States is at peace.

31 Second. Stochr & Sons, Inc., is a domestic corporation; it is not an "alien enemy" within the meaning of the "Trading with Enemy" Act. American citizens have an interest therein and the Alien Property Custodian has no jurisdiction or power over said corporation to sell the said stocks or any part thereof.

Third. The sale of said shares of stock or any part thereof is not necessary to prevent waste or to protect the property of Botany Worsted Mills of Stochr & Sons, Inc. None of the contingencies provided for in the statute are present. It is only when the contingencies set forth in the statute do exist that the Alien Property Custodian is authorized to sell.

The undersigned respectfully submits that the conditions set forth in the statute are utterly wanting both in the case of Botany Worsted Mills as well as in Stochr & Sons, Inc. The Alien Property Custodian is therefore without jurisdiction in the premises.

Fourth. The terms of sale restricting the purchasers to American citizens only and excluding therefrom citizens from other countries with whom the United States is at peace, and who are not enemy aliens, are onerous and prejudicial to the interests of Stoehr & Sons, Inc., and of the undersigned as a stockholder of same, as they will, necessarily, tend to limit the bidding at the proposed sale and will result in a sacrifice of the property to be sold.

Dated, New York, November 23, 1918.

Respectfully yours,

MAX W. STOEHR,
135 Central Park West,
New York City.

32

EXHIBIT III.

Notice of Claim under Oath, under Section 9 of "Trading with the Enemy Act," by Max W. Stoehr.

STATE OF NEW YORK,
County of New York, ss:

Max W. Stoehr being first duly sworn, deposes and says:

Deponent is a citizen of the United States, residing at No. 135 Central Park West, in the Borough of Manhattan, City and County of New York in said State. Since the 17th day of February, 1917, he has continuously been, and now is, the lawful owner and holder of record of forty-four shares of the capital stock of Stoehr & Sons, Inc., a corporation duly incorporated under the laws of the State of New York.

Deponent further states, that Stoehr & Sons, Inc., is the owner of 5,690 shares of the capital stock of Botany Worsted Mills, a corporation duly organized under the laws of the State of New Jersey.

Deponent further states, that in or about the latter part of the year 1914 Kammgarnspinnerei Stoehr & Co., Actiengesellschaft of Plagwitz, Leipzig, Germany, the owner in fact and of record of 14,900 shares of the capital stock of the defendant, Botany Worsted Mills, caused to be transferred on the books of said Company 14,900 shares of the capital stock of said company in trust for said beneficial owner of same in the following manner, to wit: 10,000 shares to Hans E. Stoehr and 4,900 shares to the deponent. That thereupon the said Trustees did, on February 20, 1917, pursuant to an agreement made between the aforesaid beneficial owner of same and Stoehr & Sons,

dated February 20, 1917, a copy of which deponent is informed is in your possession, transfer to Stoehr & Sons, Inc., 14,900 shares of stock of said Botany Worsted Mills; that by said contract said beneficial owner agreed to sell and transfer to said Stoehr & Sons, Inc., and the said Stoehr & Sons, Inc., agreed to purchase from the said Trustees, the aforesaid 14,900 shares of the capital stock of the defendant, Botany Worsted Mills, and to pay therefor the book value of the same; that the sum of \$5,000 was duly paid

by said Stoehr & Sons, Inc., to said beneficial owner of said shares as part purchase price; that by reason of the said contract of sale and the part performance thereof the said Stoehr & Sons, Inc., became possessed of the title in and to said 14,900 shares of the said capital stock of the defendant, Botany Worsted Mills.

Deponent further states, that as a stockholder in said Stoehr & Sons, Inc., he has a beneficial interest in said 20,590 shares of stock of the Botany Worsted Mills.

Deponent files this claim under the provision of Section 9 of the "Trading with the Enemy Act" in behalf of himself and of the said Stoehr & Sons, Inc., said Stoehr & Sons, Inc., being now under the control of the Alien Property Custodian is itself incapable of making this claim.

Under the provisions of said Section 9, deponent hereby makes application to the Alien Property Custodian for the return, delivery and transfer of said stock to said Stoehr & Sons, Inc., and in the meantime and until the title to said shares of stock is determined the Alien Property Custodian is hereby requested to retain in his custody the said shares of stock, as is by the Statute provided.

The Alien Property Custodian is hereby further requested not to proceed with the sale of said shares of stock as by him advertised to be held on December 2nd, 1918.

MAX W. STOEHR.

Subscribed and sworn to before me this 26th day of November, 1918.

SAMUEL K. ABRAHAMS,

[SEAL.] *Notary Public, in and for the County of Bronx.*

New York County Clerk's No. 168.

35 The President of the United States of America to James N. Wallace, Thomas Prehn, Ferdinand Kuhn, Andrew B. Duval, Walter S. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, W. J. Hellmer, H. C. Mac Eldowney, Richard Stockton, A. Mitchell Palmer, individually and as Alien Property Custodian; Stoehr & Sons, Inc., Botany Worsted Mills, Francis P. Garvan, and Paul Kieffer, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Max W. Stoehr & Sons, suing in his own behalf as a stockholder in Stoehr & Sons, Inc., and in behalf of all others similarly situated, and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you and each of you of Two Hundred and Fifty Dollars (\$250.).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, on the

2nd day of December, in the year one thousand nine hundred and eighteen, and of the Independence of the United States of America the one hundred and forty-third.

ALEX. GILCHRIST, JR.,
Clerk.

VALENTINE TAYLOR,
Solicitor for Complainant.

The defendants are required to file their answer or other defense in the above cause in the Clerk's office of this Court, on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

ALEX GILCHRIST, JR.,
Clerk.

36 [Endorsed:] District Court of the U. S., Southern District of N. Y. Max W. Stoehr, suing in his own behalf as a stockholder of Stoehr & Sons, Inc., etc., complainant, agst. James N. Wallace et al., defendants. Subpoena. U. S. District Court, S. D. of N. Y. Filed Dec. 4, 1918.

37 District Court of the United States for the Southern District of New York.

No. 2.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in Stoehr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE et al., Defendants.

Supplemental Bill.

Valentine Taylor, Solicitor for Complainant, No. 52 Wall Street, Borough of Manhattan, New York City.

Louis Marshall, Louis J. Vorhaus, of Counsel.

U. S. District Court, S. D. of N. Y. Filed Dec. 16, 1918.

38 In the District Court of the United States for the Southern District of New York.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in Stoehr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE, THOMAS PREHN, FERDINAND KUHN, ANDREW B. Duvall, Walter S. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney, Richard Stockton, A. Mitchell Palmer, Individually and as Alien Property Custodian; Stoehr & Sons, Inc., Botany Worsted Mills, Francis P. Garvan, and Paul Kieffer, Defendants.

Supplemental Bill.

To the Honorable Judges of the District Court of the United States for the Southern District of New York, in Equity sitting:

Now comes the complainant herein, and by leave of the Court first had and obtained, files this his Supplemental Bill of Complaint.

39 First. Since the filing of the original bill herein your orator, upon advice of counsel, has, on the 12th day of December, 1918, duly filed a notice of his claim, under oath, to the defendant A. Mitchell Palmer, as Alien Property Custodian, a true copy of which is hereto annexed, and marked "Complainant's Supplemental Bill, Exhibit Number 1," and made a part hereof.

Second. Your orator further states that under the provisions of said Section 9 of the said "Trading with the Enemy Act," when notice of claim under oath is so filed, and an action in equity commenced, it is the duty of the said Alien Property Custodian to retain the property in his possession, the title of which is in controversy, until the final determination of the rights of the parties to such property.

Third. By reason of the premises, and for reasons stated in the original bill of complaint herein, your orator alleges that he is entitled, as a matter of right to an order of this Court, restraining the said Alien Property Custodian from proceeding with the sale of the property set forth in the bill of complaint until the final determination of the issues raised by the pleadings in this case.

Wherefore, your orator, supplementing the prayer in the original Bill of Complaint, and not waiving any of same, prays that a preliminary injunction be issued, restraining the defendant A. Mitchell Palmer, as Alien Property Custodian, from selling and disposing of the shares of stock set forth in the original Bill of Complaint until the final hearing and determination of this cause,

22 MAX W. STOEHR, ETC., VS. JAMES N. WALLACE ET AL.

40 And your orator prays for such other and further relief
in the premises as to the Court may seem just.

MAX W. STOEHR,
Complainant.

VALENTINE TAYLOR,
Solicitor for Complainant,
52 Wall Street,
New York City.

STATE OF NEW YORK,
County of New York, ss:

Max W. Stoehr, being first duly sworn, deposes and says that he is the complainant of the above-entitled cause; that the foregoing Supplemental Bill of Complaint was duly read by him and that he knows the contents thereof, and that the same is true, except as to the matters and things stated by him to be on information and belief, and as to those matters he believes same to be true.

MAX W. STOEHR.

Subscribed and sworn to before me this 12th day of December, 1918.

SAMUEL K. ABRAHAMS,
Notary Public
in and for the County of Bronx.

[SEAL.]

New York County Clerk's Office No. 168.

41 EXHIBIT NUMBER ONE.

Complainant's Supplemental Bill.

A. P. C. Form No. 111.

Alien Property Custodian.

Notice of Claim Pursuant to Section 9 of "Trading with the Enemy Act."

To A. Mitchell Palmer, Alien Property Custodian,
Washington, D. C.:

The undersigned, hereinafter referred to as claimant, reserving to himself the right to object to the validity and constitutionality of the "Trading with the Enemy Act," pursuant to Section 9 of said Act, hereby gives you notice of claim, as follows, and hereby agrees to furnish such other information and proof as you may require.

1. Name of claimant (individual, partnership, association, corporation): Max W. Stoehr, as a stockholder of Stoehr & Sons, Inc.

2. Address of claimant: 21 West 86th Street, New York City.

3. Name of enemy or ally of enemy whose property is affected by this claim: The purchase price under the contract dated February 20th, 1917, a copy of which is herewith attached, marked "Exhibit 1," less \$5,000, paid on account of the subject matter stated therein, is due to Kammgarnspinnerei Stoehr & Co. Aktiengesellschaft, hereinafter called the German Company.

4. Residence or last known address of enemy or ally of enemy: Plagwitz-Leipzig, Saxony, Germany.

5. Name of any other persons, if known to claimant, who have any interest whatever in within claim: Stoehr & Sons, Inc.

6. Address or addresses of such person or persons: 129 Broadway, New York.

7. If the claim, notice of which is hereby given, is made for certain specific property, or for an interest in property, the following questions must be answered:

(a) The said property was conveyed, transferred, assigned, or delivered to Alien Property Custodian by: Claimant is informed that duplicate certificates for the shares of stock of Botany Worsted Mills referred to in the answer to question No. 8 herein, have been made out in the name of the Alien Property Custodian or of his nominee by order of the Board of Directors of Botany Worsted Mills, of Passaic, New Jersey.

(b) The following is an accurate description of the property affected by this notice of claim (this description must be sufficiently complete to identify the property): Five thousand six hundred and ninety (5,690) shares of the capital stock of Botany Worsted Mills, fourteen thousand nine hundred (14,900) shares of the capital stock of Botany Worsted Mills.

8. The nature of the claim, notice of which is hereby given, is as follows: (If the claim is for only part of the property, describe that part; if of an interest, state precisely what the interest is; if a debt, state fully the nature thereof, how it is evidenced, and whether there are any set-offs or counterclaims. Attach verified copies of all papers relied on to support claim.)

Claimant is a citizen of the United States, residing at No. 21 West 86th Street, in the Borough of Manhattan, City, County and State of New York. Since the 17th day of February, 1917, he has continuously been and now is the lawful owner and holder of record of forty-four (44) shares of the capital stock of Stoehr & Sons, Inc., a corporation duly organized under the Laws of the State of New York.

Stoehr & Sons, Inc., is the owner of 5,690 shares of the capital stock of Botany Worsted Mills, a corporation duly organized under the Laws of the State of New Jersey.

In and about the latter part of the year 1914, the German Company, the owner in fact and of record of 14,900 shares of the capital

stock of the Botany Worsted Mills, caused to be transferred on the books of the latter company said 14,900 shares in trust for the German Company, in the following manner, to wit: 10,000

44 shares of Hans E. Stoebr, and 4,900 shares to claimant.

Thereupon, on February 20th, 1917, pursuant to the agreement, marked "Exhibit 1," hereinbefore referred to, made between the German Company and Stoechr & Sons, Inc., dated February 20th, 1917, the aforesaid trustees transferred to Stoechr & Sons, Inc., said 14,900 shares of stock of said Botany Worsted Mills. By said contract the German Company agreed to sell and transfer to Stoechr & Sons, Inc., and the latter agreed to purchase the aforesaid 14,900 shares of the capital stock of the Botany Worsted Mills, and to pay therefor the book value thereof. The sum of \$5,000 was duly paid by Stoechr & Sons, Inc., to the German Company as part purchase price. By reason of the contract of sale and the part performance thereof, Stoechr & Sons, Inc., became vested with the ownership of and title in and to said 14,900 shares of the Botany Worsted Mills. The German Company is entitled to the unpaid balance of the purchase price of said shares pursuant to the terms of said agreement of sale as therein set forth.

As a stockholder in Stoechr & Sons, Inc., claimant has a beneficial interest in said 20,590 shares of stock of Botany Worsted Mills. He now files this claim under the provision of Section 9 of the "Trading with the Enemy Act" in behalf of himself and of all other stockholders of Stoechr & Sons, Inc., similarly situated. That company and its directors are naturally unwilling to present this claim on its behalf.

Under the provisions of that section, claimant hereby makes application to the Alien Property Custodian for the return, 45 delivery and transfer of said stock to said Stoechr & Sons, Inc., and in the meantime and until the title to such shares of stock is determined, the Alien Property Custodian is hereby requested, as by the terms of the statute provided, to retain in his custody the said shares of stock.

The Alien Property Custodian is hereby further requested not to proceed with the sale of the said shares of stock, or to part with the ownership thereof.

The claimant represents and alleges that claimant is not an enemy or ally of enemy; that no person or persons whatsoever, except as above stated, have any interest in or lien upon the proceeds of the claim set forth in the within notice; that this notice is not filed in collusion with any enemy or ally of enemy, or any other person or persons for the purpose of avoiding the terms and provisions of the "Trading with the Enemy Act"; that the claim herein referred to is in all respects bona fide, and that there are no set-offs, counter-claims, or defenses, except as herein stated.

Dated, New York, December 11th, 1918.

MAX W. STOEHR.

46 STATE OF NEW YORK,
County of New York, ss:

I swear that the foregoing statements are true and correct.

MAX W. STOEHR.

Subscribed and sworn to before me this 11th day of December, 1918.

[SEAL.]

SAMUEL K. ABRAHAMSON,

Notary Public

in and for the County of Bronx.

Bronx Co. Clerk No. 24.

Bronx County Register's No. 220.

New York County's Clerk No. 168.

New York County Register's No. 10119.

Kings County Clerk's No. 15.

Kings County Register's No. 157.

Queens County Clerk's No. 1542.

47 EXHIBIT I.

Agreement made at Passaic in the State of New Jersey, on the 20th day of February, 1917, between Kammgarn-Spinnrei Stoehr & Co., Aktiengesellschaft of Plagwitz-Leipzig, Germany, hereinafter called the "Leipzig Company," party of the first part, and Stoehr & Sons, Inc., hereinafter called the "New York Company," party of the second part, witnesseth:

Whereas, the Leipzig Company is beneficially interested in Fourteen thousand nine hundred (14,900) shares of the capital stock of the Botany Worsted Mills, a New Jersey corporation, which said shares of stock are now standing in the name of Hans F. Stoehr and Max W. Stoehr and are represented by the following certificates, each certificate being for Five (5) shares of said stock:

No. 51 to 1050, No. 3441 to 3500, No. 4061 to 500, No. 1051 to 1400, No. 204 to 2017, No. 2041 to 2060, No. 2151 to 2171, No. 2861 to 2884, No. 2890 to 2898, No. 3161 to 3260, No. 5251 to 5369, No. 5389 to 5411, No. 5451 to 5750;

and

Whereas, the Leipzig Company is desirous of selling and said New York Company is desirous of purchasing said interest on the terms and conditions hereinafter set forth,

Now therefore, in consideration of the premises and of Five thousand (\$5,000) Dollars paid by the New York Company to the Leipzig Company on account of the purchase price, the receipt whereof

48 is hereby acknowledged, and in further consideration of the mutual promises of the parties as herein set forth, it is hereby agreed as follows:

First. The Leipzig Company hereby sells, assigns and transfers unto the New York Company all of its interest in said shares and said shares of stock shall be forthwith transferred upon the books

of the Botany Worsted Mills and placed in the name of the said New York Company.

Second. The terms of the sale and the purchase price for said shares shall be determined as follows and paid in the following installments:

(a) The purchase price shall be determined by and shall be equal to the book value of said shares as shown by the books of the Botany Worsted Mills. The price shall be payable in five (5) installments, the first instalment being payable one year from date and the subsequent installments respectively in two, three, four and five years from date. From the last or fifth installment the sum of \$5,000, paid on account as hereinbefore recited with interest at six per cent. from date shall be deducted.

(b) The first annual installment shall be based upon and shall be equal to the book value of said shares, as shown by the books of the Botany Worsted Mills according to the last previous closing of its books on November 30, 1917; and the four subsequent annual installments shall be similarly based upon and shall be equal to the book value of the shares as shown by the last previous closing of the books of the Botany Worsted Mills on the 30th of November preceding the falling due of each of said annual installments.

49 (c) In arriving at the amount of each installment for each of said years the net worth of the hard assets of the Botany Worsted Mills after deducting the total liabilities shall be taken as the basis for the computation of the value per share and no allowance or increase shall be made on such installment for good will.

(d) In addition to the book value of said shares there shall be taken into consideration and account the amount of the dividends received by the New York Company during the said five years from date in the following manner:

During the first year the amount of the entire dividends received by the New York Company on the said shares shall be added to the purchase price and shall be paid with the first installment; during the second year four-fifths of the entire dividends received on said shares of stock by the New York Company, during the third year three-fifths of said dividends, during the fourth year two-fifths of said dividends and during the fifth year one-fifth of said dividends so received on said shares shall be added to the annual instalments of the purchase price and shall become part of said purchase price and shall be payable with each of said installments at the end of each of said respective years.

Third. That the certificates of stock for said Fourteen thousand nine hundred shares sold and transferred as hereinbefore provided shall be placed in the possession of the Leipzig Company as collateral security for the amount of the purchase price; but as each
50 annual installment with said additions provided for in paragraph Second, Subdivision d, is paid the New York Com-

pany shall have the right to require the redelivery of, and the Leipzig Company will contemporaneously with the payment of each installment redeliver to the New York Company, one-fifth (1/5th) of said shares and thereupon the Leipzig Company shall continue to retain the remaining shares as collateral security for the balance of the purchase price still payable.

Fourth. The New York Company shall have the right at any time to require the deposit of the entire shares of stock or any balance thereof remaining in the hands of the Leipzig Company, with a bank or trust company to be selected by the Leipzig Company, such deposit to be made with such bank or trust Company in escrow, to be held until the purchase price or the balance remaining unpaid shall have been fully paid or (in case of non-payment of any installment) until the Leipzig Company shall be entitled to said stock under the provisions of paragraph Fifth of this agreement.

Fifth. In the event that any of the said annual installments with said additions provided for in paragraph Second, sub-division *d* hereof, shall not be paid when due, then the Leipzig Company shall notify the New York Company in writing that it requires the payment of the installment then due together with the said additions and in the event that the New York Company shall not within sixty (60) days after said demand pay the said installment with the additions then the said shares of stock or any remaining balance of said stock shall be forthwith retransferred to the said Leipzig Company on the books of the Botany Worsted Mills and all rights on the part of the New York Company to said stock or any such

51 balance shall cease and the Leipzig Company shall retain the Five thousand (\$5,000) dollars, paid on account as hereinbefore recited, in full settlement of any claim against the New York Company and thereupon neither of said companies shall have any further claim against the other arising under or by reason of this agreement; it being understood that the non-payment of any subsequent installment shall not affect the portion or portions of the stock which may have been fully paid for by a previous installment or installments.

In witness whereof the parties hereto have affixed their corporate signatures the day and year above written.

KAMMGARNSPINNEREI STOEHR & CO.,
Aktiengesellschaft,

By HANS E. STOEHR.

In the presence of
CARL ZIMMERMANN.

STOEHR & SONS, INC.,
By GEORG G. ROHLIG,
Vice President.

Attest:
MAX W. STOEHR,
Secretary.

52 United States District Court, Southern District of New York.

MAX W. STOHR, Suing in His Own Behalf as a Stockholder in
Stoehr & Sons, Inc., and in Behalf of All Others Similarly Sit-
uated, Complainant,

against

JAMES N. WALLACE, THOMAS PREHN, FERDINAND KUHN, ANDREW
B. Duvall, Walter S. Jones, Thomas F. Martin, Thomas J.
Maloney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney,
Richard Stockton, A. Mitchell Palmer, Individually and as Alien
Property Custodian; Stoehr & Sons, Inc., Botany Wopsted Mills,
Francis P. Garvan, and Paul Kieffer, Defendants.

A motion having been made herein for an order directing that
Francis P. Garvan as Alien Property Custodian be substituted as def-
endant herein in place and stead of the defendant A. Mitchell
Palmer, sued as Alien Property Custodian, and said motion having
duly come on to be heard, and no opposition thereto having been
made.

Now, on motion of Francis G. Caffey, solicitor for the defendant
A. Mitchell Palmer it is

Ordered that Francis P. Garvan as Alien Property Custodian be
substituted as the defendant herein in place and stead of the defend-
ant A. Mitchell Palmer, sued as Alien Property Custodian, and that
the time of the defendant Francis P. Garvan as Alien Property
Custodian to answer the bill of complaint herein be extended to the
14th day of April, 1919.

AUGUSTUS N. HAND,
U. S. D. J.

53 [Endorsed:] District Court of the U. S., Southern District
of N. Y. Max W. Stoehr, suing in his own behalf as a stock-
holder in Stoehr & Sons, Inc., etc., versus James N. Wallace, Thomas
Pohn, Ferdinand Kuhn, Andrew B. Duvall, Walter S. Jones, et al.
Order. Francis G. Caffey, United States Attorney. U. S. District
Court, S. D. of N. Y. Filed April 9, 1919.

54 District Court of the United States for the Southern District of New York.

No. 2.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in Stoechr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE et al., Defendants.

Answer of A. Mitchell Palmer Individually.

Francis G. Caffey, Solicitor for defendant A. Mitchell Palmer, individually, U. S. Court and Post Office building, New York city.

George L. Ingraham, Lee C. Bradley, of Couns.l.

U. S. District Court, S. D. of N. Y. Filed May 26, 1919.

55 District Court of the United States for the Southern District of New York.

No. 2.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in Stoechr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE, THOMAS PREHN, FERDINAND KUHN, ANDREW B. DUVALL, Walter S. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney, Richard Stockton, A. Mitchell Palmer, Individually and as Alien Property Custodian; Stoechr & Sons, Inc., Botany Worsted Mills, Francis P. Garvan, and Paul Kieffer, Defendants.

Answer of A. Mitchell Palmer Individually.

Now comes the above named defendant, A. Mitchell Palmer, individually, and answering the bill of complaint and supplemental bill exhibited in this cause says:

56 First. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph first of the bill that Max W. Stoechr is and ever since 1910 has been a citizen of the United States and of the State of New York and an actual resident in the City and County of New York, in said

State; and that the defendant Stocher & Sons, Inc., is and ever since February 17, 1917, has been a corporation duly organized by and under the laws of the State of New York.

The said defendant admits the other allegations of paragraph first of the bill.

Second. This defendant denies the allegations of paragraph second of the bill.

Third. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph third of the bill.

Fourth. This defendant admits the allegations of paragraph fourth of the bill.

Fifth. This defendant admits the allegations of paragraph fifth of the bill.

Sixth. This defendant denies the allegations of paragraph sixth of the bill.

Seventh. This defendant denies the allegations of paragraph seventh of the bill, except that he admits that prior to February, 1915, 14,900 shares of the capital stock of the Botany Worsted Mills stood on the books of said Botany Worsted Mills in the name of Kammgarnspinnerei Stocher & Company, Aktiengesellschaft; and that on or about February 15, 1915, ten thousand (10,000) of said 14,900 shares of said stock were transferred on the books of the Botany Worsted Mills from the name of Kammgarnspinnerei Stocher & Company, Aktiengesellschaft, into the name of Hans E. Stocher, as Trustee; and that on or about February 26, 1915, the remaining 4,900 shares of said 14,900 shares were transferred on the books of the Botany Worsted Mills from the name of Kammgarnspinnerei Stocher & Company, Aktiengesellschaft, into the name of Max W. Stocher, as Trustee.

Eighth. This defendant denies the allegations of paragraph eighth of the bill.

Ninth. This defendant denies the allegations of paragraph ninth of the bill, except that he admits that on April 6, 1917, and December 7, 1917, respectively, the United States of America recognized that a state of war existed between the United States and the then Empire of Germany and the then Empire of Austria-Hungary, and except also that he admits that an armistice was signed on November 11, 1918.

Tenth. This defendant denies the allegations of paragraph tenth of the bill.

Eleventh. This defendant denies the allegations of paragraph eleventh of the bill.

Twelfth. This defendant denies the allegations of paragraph twelfth of the bill.

58 Thirteenth. This defendant denies the allegations of paragraph thirteenth of the bill.

Fourteenth. This defendant admits that on or about the 20th of March, 1918, the defendants Botany Worsted Mills and Stoehr & Sons, Inc., were and now are solvent, and that the said Botany Worsted Mills had a large surplus and reserve fund.

This defendant denies each and all of the other allegations of paragraph fourteenth of the bill.

Fifteenth. This defendant admits that the terms and conditions of sale of the stock of the Botany Worsted Mills advertised by the Alien Property Custodian to be sold are substantially alleged in paragraph fifteenth of the bill.

This defendant denies each and all of the other allegations and conclusions of paragraph fifteenth of the bill.

Sixteenth. This defendant denies the allegations of paragraph sixteenth of the bill.

Seventeenth. This defendant denies the allegations of paragraph seventeenth of the bill.

Eighteenth. This defendant admits that on or about November 29, 1918, there was filed in the office of the Alien Property Custodian an instrument purporting to be a notice of claim under oath under Section 9 of the "Trading with the Enemy Act" by Max W. Stoehr, and that a copy of said instrument is annexed to the bill of complaint in this cause marked Exhibit III.

This defendant denies each and all of the other allegations of paragraph eighteenth of the bill.

59 Nineteenth. This defendant denies the allegations of fact and conclusions of paragraph nineteenth of the bill.

Twentieth. This defendant denies the allegations of fact and conclusions of paragraph twentieth of the bill.

Twenty-first. This defendant denies the allegations of paragraph first of the supplemental bill, purporting to be sworn to December 12, 1918, except that he admits that on or about December 12, 1918, a notice was filed with the Alien Property Custodian substantially in the form annexed to the supplemental bill and marked "Complainant's Supplemental Bill, Exhibit No. 1."

Twenty-second. This defendant denies the allegations of paragraph second of the supplemental bill.

Twenty-third. This defendant denies the allegations of paragraph third of the supplemental bill.

As a first, separate and distinct defense to the bill of complaint of the complainant herein, this defendant further alleges and shows to the Court:

Twenty-fourth. The complainant is not a person claiming any interest, right or title in any money or other property which
60 has been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian, pursuant to the provisions of the "Trading with the Enemy Act," as amended, so as to entitle the complainant to the benefit of the provisions of Section 9 of the "Trading with the Enemy Act," as amended; that the complainant is not a claimant within the meaning of said Section 9 of the "Trading with the Enemy Act," and was and is not entitled to make or file with the Alien Property Custodian a notice of his claim, under oath, or to institute a suit in equity in this Court to establish the interest, right, title or debt claimed to be due, that the plaintiff is not a person claiming any interest, right or title to the stock of the Botany Worsted Mills described in the complaint, and that therefore this Court is without jurisdiction to grant the relief prayed for in the bill herein.

For a second, separate and distinct defense to the bill of complaint of the complainant herein, the said defendant further alleges and shows to the Court:

Twenty-fifth. Prior to February 15, 1915, Kammgarnspinnerei Stoehr & Co., Aktiengesellschaft of Plagwitz, Leipzig, Germany, which Company as this defendant is informed and believes was and is a corporation organized under the laws of the then Empire of Germany, was the owner of record on the books of the
61 Botany Worsted Mills, a corporation organized under the laws of the State of New Jersey, of 14,900 shares of the capital stock of the Botany Worsted Mills. On or about the 15th of February, 1915, there was transferred on the books of the Botany Worsted Mills 10,000 shares of the said 14,900 shares to Hans E. Stoehr as Trustee for said Kammgarnspinnerei Stoehr & Company. On or about February 26, 1915, there was transferred on the books of the Botany Worsted Mills the remaining 4,900 of said shares to Max W. Stoehr as Trustee for said Kammgarnspinnerei Stoehr & Company.

Twenty-sixth. Prior to February 19, 1917, the complainant Max W. Stoehr, Eduard Stoehr, who was the father of the complainant and who was a German subject residing in Germany, Hans E. Stoehr, who was a brother of the complainant and who was a German subject, and Georg Stoehr who was a brother of the complainant and who was a German subject residing in Germany, were partners engaged in business under the firm name and style of Stoehr & Sons. The principal place of business of said partnership was in New York City, New York.

Twenty-seventh. The purposes of said co-partnership of Stoehr & Sons as stated in the agreement of copartnership among the said partners were to do a general mercantile and commission business; to engage in the purchase, lease or sale of real or other property, including the purchase and sale of shares of stock and other securi-

ties as well as of goods and merchandise; to participate in industrial enterprises; to purchase, lease and sell and be interested
 62 in textile and other factories, and to dispose of the output of such factories; and in general to promote the interests of the partners and of their families by consolidating various property interests and to manage such property interests through the said copartnership.

Twenty-eighth. The capital of said copartnership of Stoehr & Sons as stated in said copartnership agreement was the sum of \$560,000 contributed by the various partners as follows:

Eduard Stoehr a German citizen residing in Germany..	\$420,000.
Hans E. Stoehr a German citizen	80,000.
Georg Stoehr a German citizen residing in Germany ...	50,000.
Max W. Stoehr the complainant herein	10,000.
Total	\$560,000.

Twenty-ninth. On or about February 16, 1917, there was filed in the office of the Secretary of State of New York, a certificate of incorporation of a corporation Stoehr & Sons, Inc., with an authorized capital stock of \$250,000 consisting of 2,500 shares of the par value of \$100 each. Its principal purposes as stated in the certificate of incorporation were to deal in textile products, cloth and raw material and stocks and bonds. The minutes of the first meeting of its board of directors, held February 19, 1917, contain a resolution authorizing the issuance of the entire stock of the Company for the
 63 business, property, good will, firm name and other assets of Stoehr & Sons, the partnership above referred to, upon the assumption by Stoehr & Sons, Inc., of all the liabilities of the said partnership. The stock of said Stoehr & Sons, Inc., was issued on February 19, 1917, as follows:

Stockholder.	Number of shares.
Max W. Stoehr	1,875
Hans E. Stoehr	357.14
Max W. Stoehr	223.21
Max W. Stoehr	44.65

The said 1,875 shares and the said 223.21 shares issued to Max W. Stoehr as aforesaid were issued to said Max W. Stoehr as Trustee, for said Eduard Stoehr and said Georg Stoehr respectively. The stock so issued was issued to or for the above named stockholders in the proportion that the said partners in said Stoehr & Sons, said copartnership, had been interested in said partnership assets.

Thirtieth. A transfer of the assets of the said partnership of Stoehr & Sons to Stoehr & Sons, Inc., was made by what purports to be a bill of sale dated February 19, 1917, purporting to be signed

"Stoehr & Sons" and witnessed by Max W. Stoehr, the complainant herein. This defendant alleges upon information and belief that the said defendant Stoehr & Sons, Inc., never obtained the title to the said assets of the partnership Stoehr & Sons by reason of said alleged bill of sale or otherwise, and that there was no valid transfer of any right, title or interest in said assets of the partnership of Stoehr & Sons to the defendant Stoehr & Sons, Inc. The

64 partnership agreement of Stoehr & Sons contained a provision to the effect that said Eduard Stoehr and said Hans E. Stoehr should be the active partners, and said Georg Stoehr and said Max W. Stoehr should be the silent or passive partners, and that the active partners should have the right to conduct the business in such manner as they might think best, except that no transaction involving more than \$25,000 should be consummated without the written consent of all the partners. This defendant further alleges that the assets of Stoehr & Sons so attempted to be transferred to Stoehr & Sons, Inc., were largely in excess of the sum of \$25,000, and that no such written consent was ever obtained to the pretended transfer of the assets of Stoehr & Sons to Stoehr & Sons, Inc., as above set forth. This defendant further alleges that said pretended transfer of all the partnership assets of Stoehr & Sons was attempted to be made by Hans E. Stoehr and Max W. Stoehr pretending to act on behalf of all the partners, and was illegal, void and of no effect, and that the issue of the stock of the said corporation, in consideration of the said pretended assignment of the assets of the said co-partnership was ultra vires of the said corporation and void. This defendant further alleges that said transfer, if it had any validity or effect, operated only to transfer the assets of the partnership belonging to said Hans E. Stoehr and said Max W. Stoehr individually and caused a dissolution of the partnership.

Thirty-first. On the same day, to wit, February 19, 1917, all of said 2,500 shares of stock were transferred on the books of

65 Stoehr & Sons, Inc., to Hans E. Stoehr, Max W. Stoehr and one Georg Rohlig as voting trustees under a certain voting trust agreement dated February 19, 1917, between the stockholders of Stoehr & Sons, Inc., and said Hans E. Stoehr, said Max W. Stoehr and said Georg Rohlig, and voting trust certificates were thereupon issued by said voting trustees as follows:

Certificate holder.	Number of shares.
Max W. Stoehr, trustee	1,875
H. E. Stoehr	357.14
Max W. Stoehr, trustee	223.21
Max W. Stoehr	44.65

Max W. Stoehr received and held said voting trust certificates for 1,875 shares and 223.21 shares respectively as trustee for said Eduard Stoehr, a subject and resident of the then Empire of Germany, and

for said Georg Stoechr, a subject and resident of the then Empire of Germany, respectively.

Thirty-second. Among the assets of the partnership of Stoechr & Sons were 5,690 shares of the capital stock of the Botany Worsted Mills, which 5,690 shares were subsequent to February 19, 1917, transferred on the books of the Botany Worsted Mills from Stoechr & Sons to Stoechr & Sons, Inc. Upon information and belief the defendant alleges that said Max W. Stoechr and Hans E. Stoechr through their stock ownership in the Botany Worsted Mills and through said stock ownership of Kammgarnspinnerei Stoechr & Company, controlled the election of directors and otherwise dominated and controlled the action of the Botany Worsted Mills and its officers, and the transfer of said 5,690 shares on the books of the Botany Worsted
66 mills from Stoechr & Sons to Stoechr & Sons, Inc., was made and brought about through said domination and control. But this defendant alleges that there was no delivery of the certificates representing 4,400 shares out of said 5,690 shares endorsed either in blank or to a specified person or persons appearing by the certificates to be the owner or owners of the shares of stock represented thereby from Stoechr & Sons to Stoechr & Sons, Inc., and no delivery of the certificates representing the same with any separate document or documents containing a written assignment or assignments of said certificates and with no power of attorney to sell, assign or transfer the same either in blank or otherwise, and that the title to 4,400 out of said 5,690 shares of stock of the Botany Worsted Mills was not transferred to Stoechr & Sons, Inc., pursuant to the provisions of Chapter 191 of the Laws of 1916 of New Jersey, said Act being entitled "An Act to make uniform the law of transfer of shares of stock in corporations," approved March 18, 1916.

Thirty-third. At the second meeting of the board of directors of Stoechr & Sons, Inc., held February 20, 1917, a resolution was passed purporting to authorize the purchase of the interest of said Kammgarnspinnerei Stoechr & Company in said 14,900 shares of the capital stock of the Botany Worsted Mills by Stoechr & Sons, Inc., from said Kammgarnspinnerei Stoechr & Company. On or about February 20, 1917, an instrument, a copy of which is attached to the bill of complaint herein marked Exhibit 1, was signed in the name of Kammgarnspinnerei Stoechr & Company, Aktiengesellschaft, by
67 Hans E. Stoechr, and was signed in the name of Stoechr & Sons, Inc., by Georg G. Rohlig, Vice-President, which instrument purported to transfer the beneficial interest in the said 14,900 shares from the Kammgarnspinnerei Stoechr & Company, the beneficial owner thereof as above set forth, to the defendant Stoechr & Sons, Inc.

Thirty-fourth. The said paper set forth in the bill of complaint herein as Exhibit 1 contains a recital that \$5,000 was paid by Stoechr & Sons, Inc., to Kammgarnspinnerei Stoechr & Company, but this defendant alleges that neither said sum of \$5,000 nor any other sum whatsoever was paid by Stoechr & Sons, Inc., to the said Kammgarn-

spinnerei Stoehr & Company, but that said sum of \$5,000 was merely credited on the books of Stoehr & Sons, Inc., to the Botany Worsted Mills, and that said sum of \$5,000 was credited on the books of the Botany Worsted Mills to the account of Kammgarnspinnerei Stoehr & Company and debited to the account of Stoehr & Sons, Inc., and that no money or other thing of value passed from Stoehr & Sons, Inc., to Kammgarnspinnerei Stoehr & Company. Upon information and belief this defendant alleges that the crediting of said \$5,000 and the other book-keeping entries regarding the same as set forth in this paragraph were procured and brought about through the domination and control of the Botany Worsted Mills by said Hans E. Stoehr and said Max W. Stoehr, as hereinabove set forth.

68 Thirty-fifth. On February 20, 1917, ten thousand (10,000) of said fourteen thousand nine hundred (14,900) shares, which had previously stood on the books of the Botany Worsted Mills in the name of Hans E. Stoehr, as Trustee for Kammgarnspinnerei Stoehr & Company, were transferred on the books of the Botany
Worsted Mills from his name as such trustee to the name of Stoehr & Sons, Inc. On the same day, to wit, February 20, 1917, the remaining four thousand nine hundred (4,900) of said fourteen thousand nine hundred (14,900) shares, which had previously stood upon the books of Botany Worsted Mills in the name of Max W. Stoehr as trustee for said Kammgarnspinnerei Stoehr & Company, were transferred on the books of the Botany Worsted Mills from his name as such trustee into the name of Stoehr & Sons, Inc. But this defendant alleges that there was no delivery of the certificates representing said 14,900 shares endorsed either in blank or to a specified person or persons appearing by the certificates to be the owner or owners of the shares of stock represented thereby from said Hans E. Stoehr and Max W. Stoehr, as Trustees, to Stoehr & Sons, Inc., and no delivery of the certificates representing the same with any separate document or documents containing a written assignment or assignments of said certificates and with no power of attorney to sell, assign or transfer the same either in blank or otherwise, and this defendant alleges that the title to said 14,900 shares of stock was not transferred to Stoehr & Sons, Inc., pursuant to the provisions of Chapter 191 of the Laws of 1916 of the State of New Jersey, said Act being entitled "An Act to make uniform the law of transfer of shares of stock in corporations," approved March 18, 1916.

69 Thirty-sixth. This defendant further alleges that said instrument of February 20, 1917, was not executed by Kammgarnspinnerei Stoehr & Company alleged to be one of the parties thereto; that the alleged signing of said instrument was not the act of Kammgarnspinnerei Stoehr & Company; that said instrument does not purport to have been signed or executed by an officer or agent of Kammgarnspinnerei Stoehr & Company; that the said Kammgarnspinnerei Stoehr & Company never by any corporate act or otherwise authorized or ratified the execution of said instrument; and that said Kammgarnspinnerei Stoehr & Company had no notice or knowledge of the existence of said alleged instrument or of the

attempted transfer of its interest in said 14,900 shares of stock, and had no knowledge whatever concerning the same; but on the contrary, at the time of said attempted transfer of said interest, the relations between the United States of America and the then Empire of Germany had been broken off, and it was impossible and illegal for the complainant, or his brother Hans E. Stoehr, or any other person resident or domiciled in the United States to communicate with said Kammgarnspinnerei Stoehr & Company; that said instrument was in respect to the rights of said Kammgarnspinnerei Stoehr & Company in said 14,900 shares void and of no legal effect; that the Botany Worsted Mills and the officers and directors of said defendant Botany Worsted Mills were at the time of the attempted transfer of said 14,900 shares to Stoehr & Sons, Inc., dominated and controlled as hereinabove set forth by said Hans E. Stoehr and said Max W. Stoehr, and to carry out the illegal scheme of the parties to said alleged contract of February 20, 1917, the said Hans E. Stoehr and Max W. Stoehr caused an alleged transfer of said 14,900 shares of stock of the Botany Worsted Mills herein referred to to Stoehr & Sons, Inc., to be made upon the books of the Botany Worsted Mills; that said attempted transfer was ineffectual to transfer the

70 title of said 14,900 shares from the Kammgarnspinnerei Stoehr & Company to Stoehr & Sons, Inc., and was void ab initio and of no legal force and effect.

Thirty-seventh. This defendant alleges that from the 22nd day of October, 1917, until the 7th day of March, 1919, A. Mitchell Palmer was the Alien Property Custodian duly appointed by the President of the United States pursuant to the provisions of the Act of Congress of October 6, 1917, known as the "Trading with the enemy Act," and that as such Alien Property Custodian, from the 22nd day of October, 1917, to the 7th day of March, 1919, the said A. Mitchell Palmer was authorized to exercise all the powers conferred upon such official by said Act as amended and by the Presidential proclamations and executive orders issued pursuant thereto. On or about the 7th day of March, 1919, the said A. Mitchell Palmer duly resigned his office of Alien Property Custodian, and Francis P. Garvan was duly appointed Alien Property Custodian pursuant to the provisions of the "Trading with the enemy Act," has duly qualified as such Alien Property Custodian and he is authorized to exercise all the powers conferred upon such official by said Act as amended by the Presidential proclamation and executive orders issued pursuant thereto.

Thirty-eighth. On or about April 5, 1918, the Alien Property Custodian, after investigation having previously determined pursuant to the provisions of said "Trading with the Enemy Act" that said 14,900 shares of the capital stock of the Botany Worsted Mills was property belonging to or held for, by, on account of, or on behalf of or for the benefit of an enemy or an ally of enemy not holding a license granted by the President under said Act, duly demanded of the defendant Botany Worsted Mills that the

71 said 14,900 shares of stock should be transferred and delivered to

the Alien Property Custodian or his nominee and on the 24th day of February, 1919, he as such official seized said shares of stock and required the Botany Worsted Mills to cancel the certificates evidencing or representing said shares of stock and in lieu thereof to issue new certificates therefor in the name of A. Mitchell Palmer, Alien Property Custodian, and in so doing he expressly reserved all rights acquired under or by virtue of the requirement above mentioned. On or about the 22nd of April, 1918, said 14,900 shares of stock were duly transferred by the Botany Worsted Mills on the books of said Company to the People's Bank and Trust Company, of Passaic, New Jersey, as depository for the Alien Property Custodian and the Botany Worsted Mills did on or about the 25th day of February, 1919, in further compliance with said requirements of said official and of the Trading with the Enemy Act, cancel said certificates theretofore issued representing said 14,900 shares of stock and in lieu thereof did issue new certificates in the name of A. Mitchell Palmer, as Alien Property Custodian. On or about March 13, 1919, the Alien Property Custodian duly demanded from Stoehr & Sons, Inc., all the rights, privileges and benefits of Kammgarnspinnerei Stoehr & Company, Actiengesellschaft, under the said contract between said Kammgarnspinnerei Stoehr & Company, Actiengesellschaft, and Stoehr & Sons, Inc., dated February 20, 1917, and duly seized said rights, privileges and benefits, expressly reserving all rights accruing under or by virtue of any demands theretofore or thereafter made with respect to said 14,900 shares.

72 Thirty-ninth. The Alien Property Custodian, under the provisions of said "Trading with the Enemy Act," as amended, upon the determination of the enemy ownership of or interest in said 14,900 shares of stock as aforesaid, and upon the demand made therefor as aforesaid, and upon the seizure of the rights, privileges and benefits of the Kammgarnspinnerei Stoehr & Company as above set forth, succeeded to all the rights of Kammgarnspinnerei Stoehr & Company of Leipzig in respect to said instrument, including the right of the Kammgarnspinnerei Stoehr & Company to disaffirm, repudiate, abrogate and terminate said instrument and to set aside the alleged transfer of said 14,900 shares of stock into the name of Stoehr & Sons, Inc., claimed to have been made pursuant to the terms of said instrument, and in making said determination and demands did, as the successor under the provisions of the "Trading with the Enemy Act," as amended, to the interest and rights of Kammgarnspinnerei Stoehr & Company in said 14,900 shares, repudiate, disaffirm, abrogate and terminate said instrument and did duly and lawfully cause to be set aside the alleged transfer of said 14,900 shares of stock from Kammgarnspinnerei Stoehr & Company to Stoehr & Sons, Inc., and did cause said 14,900 shares to be duly and lawfully transferred on the books of the Botany Worsted Mills to the People's Bank and Trust Company as depository of the Alien Property Custodian as aforesaid and did seize said stock and caused the certificates therefor to be cancelled and new certificates to be issued in lieu thereof to A. Mitchell Palmer, as Alien Property Custodian.

73 None of the deferred instalments of the purchase price or any part thereof was paid when due or at any other time. At the time of the making of each of the demands and seizure hereinabove in paragraphs thirty-eighth and thirty-ninth mentioned the said Stoechr & Sons, Inc., was in default as aforesaid, and the intent, purpose and legal effect of said demands and of each of them was to determine that said Stoechr & Sons, Inc., had no right, title or interest in said 14,900 shares of stock, and to exclude said Stoechr & Sons, Inc., from the enjoyment of any right, title or interest therein, as the said demands were effective to the end aforesaid, whether the right so to do arose from such default or otherwise.

As a third, separate and distinct defense to the allegations of the bill of complaint herein, this defendant alleges and shows to the court:

Fortieth. This defendant repeats and realleges the allegations contained in paragraphs twenty-fifth to thirty-ninth inclusive of this answer with the same force and effect as if the allegations contained in said paragraphs were here set forth at length.

Forty-first. Defendant further alleges that the said instrument, Plaintiff's Exhibit 1, was absolutely void and of no effect for
74 the reason that said instrument purports to be signed on behalf of Kammgarnspinnerei Stoechr & Company by Hans E. Stoechr, and that the said Hans E. Stoechr was at the time of the alleged execution of said instrument the president and a director of and one of the chief stockholders of Stoechr & Sons, Inc., the other party to said alleged instrument; that the attempted transfer by said instrument of the interest in said 14,900 shares of stock by the said Hans E. Stoechr and said Max W. Stoechr, who at that time stood in a fiduciary relation to the said Kammgarnspinnerei Stoechr & Company, was void and of no effect as against public policy and the rights of the beneficiary, said Kammgarnspinnerei Stoechr & Company, and of the Alien Property Custodian as successor to such beneficiary, Kammgarnspinnerei Stoechr & Company, for the reason that it was in effect an attempted transfer of the property of the principal by the fiduciaries to or for the benefit of the fiduciaries themselves as the holders or beneficial owners of stock in Stoechr & Sons, Inc., that such an attempted transfer by such trustees or fiduciaries of said 14,900 shares to Stoechr & Sons, Inc., the corporation in which they were personally interested, was and is absolutely invalid and void as against public policy; and that it was and is immaterial whether the said alleged contract or the attempted transfer of said interest thereunder was fair or for the benefit of said Kammgarnspinnerei Stoechr & Company or otherwise.

Forty-second. The Alien Property Custodian under the provisions of said "Trading with the Enemy Act," upon the determination of the enemy ownership of or interest in said 14,900 shares of
75 stock as aforesaid, and upon demand made therefor as aforesaid, and seizure thereof as aforesaid, and upon the seizure of the rights, privileges and benefits of the Kammgarn-

spinnerei Stoehr & Co. as above set forth, succeeded to the rights of the Kammgarnspinnerei Stoehr & Company of Leipzig, in respect to the title and ownership of said 14,900 shares, and also in respect to said instrument, Plaintiff's Exhibit 1, including the right of the Kammgarnspinnerei Stoehr & Company to disaffirm and repudiate said instrument and to set aside the alleged transfer of the interest in said 14,900 shares of stock into the name of Stoehr & Sons, Inc., claimed to have been made pursuant to the terms of said instrument, and this defendant became vested with all the rights, interests and powers of said Kammgarnspinnerei Stoehr & Company in or with respect to said 14,900 shares of stock and said alleged instrument, Plaintiff's Exhibit 1, and in making the aforesaid determination and demands and seizure did, as the successor, under the provisions of the "Trading with the Enemy Act," to the rights and interests of Kammgarnspinnerei Stoehr & Company in said 14,900 shares and with respect to said alleged contract, repudiate and disaffirm said contract, and did duly and legally cause said 14,900 shares of stock to be transferred on the books of the Botany Worsted Mills from the name of Stoehr & Sons, Inc., to People's Bank and Trust Company of Passaic, New Jersey, as depository for the Alien Property Custodian as aforesaid, and did seize said stock and caused the certificates therefor to be cancelled and new certificates to be issued in lieu thereof to A. Mitchell Palmer, as Alien Property Custodian.

76 As a fourth, separate and distinct and partial defense to the allegations of the bill of complaint herein, this defendant alleges and shows to the court:

Forty-third. Prior to February 15, 1915, Kammgarnspinnerei Stoehr & Company, Aktiengesellschaft, of Plagwitz, Leipzig, Germany, a corporation organized under the laws of the then Empire of Germany, was the owner in fact and of record on the books of the Botany Worsted Mills of 14,900 shares of the capital stock of the Botany Worsted Mills.

Forty-fourth. On or about February 15, 1915, there was transferred 10,000 of said 14,900 shares on the books of the Botany Worsted Mills to Hans E. Stoehr, as trustee for said Kammgarnspinnerei Stoehr & Company; and on or about February 26, 1915, there was transferred the remaining 4,900 of said shares on the books of the Botany Worsted Mills to Max W. Stoehr, as Trustee for Kammgarnspinnerei Stoehr & Company.

Forty-fifth. On or about February 16, 1917, there was filed in the office of the Secretary of State of New York, a certificate of incorporation of Stoehr & Sons, Inc., with an authorized capital stock of \$250,000 consisting of 2,500 shares of the par value of \$100 each.

77 Forty-sixth. On or about February 20, 1917, an instrument was signed in the name of Kammgarnspinnerei Stoehr & Company by Hans E. Stoehr and in the name of Stoehr & Sons, Inc., by George G. Rohlig, Vice-President, a copy of which instru-

ment is annexed to the complaint and marked Complainant's Exhibit 1; that the subject matter of said instrument was said 14,900 shares of stock.

Forty-seventh. Said 14,900 shares were on or about February 20, 1917, transferred on the books of the Botany Worsted Mills from the names of Hans E. Stoechr, Trustee as aforesaid, and Max W. Stoechr, Trustee as aforesaid, respectively, to the name of Stoechr & Sons, Inc.

Forty-eighth. On or about April 5, 1918, the Alien Property Custodian, having duly and lawfully and in accordance with the provisions of the "Trading with the Enemy Act," and in particular with the provisions of Section 7, sub-section (c) of said Act, after investigation determined that said 14,900 shares of stock of Botany Worsted Mills, hereinabove referred to, belonged to or were held for, by, or on account of, or on behalf of or for the benefit of an enemy or ally of enemy not holding a license granted by the President under said "Trading with the Enemy Act," duly demanded that the Botany Worsted Mills transfer to the Alien Property Custodian said 14,900 shares of stock. Said 14,900 shares of stock were thereafter and on or about the 22nd of April, 1918, duly transferred on the books of the Botany Worsted Mills to Peoples Bank and Trust Company, of Passaic, New Jersey, as depositary
78 for the Alien Property Custodian. Said 14,900 shares stood of record on the books of the Botany Worsted Mills in the name of Peoples Bank and Trust Company, as depositary for the Alien Property Custodian until the 25th day of February, 1919.

Forty-ninth. On the declaration that a state of war existed between the United States of America and the then Empire of Germany all obligations and contractual relations between citizens of the United States of America and of the Empire of Germany were dissolved and abrogated and to carry out during the war any part of such a contract would involve intercourse with the enemy and would be illegal and upon the declaration of war as aforesaid, the same was dissolved and became void and was abrogated.

Fiftieth. If any contract or agreement existed between Kammgarnspinner-i Stoechr & Company and Stoechr & Sons, Inc., respecting said 14,900 shares of stock, the recognition by the United States of America on April 6, 1917, of the existence of a state of war between the United States of America and the then Empire of Germany dissolved said contract between said parties, for the reason that any performance of said contract or the continuance of said contract would involve trading or intercourse with the enemy and said contract upon the declaration of war as aforesaid became illegal and void and was abrogated.

79 For a fifth, separate and distinct and partial defense to the allegations of the bill of complaint herein, this defendant alleges and shows to the court:

Fifty-first. Prior to February 19, 1917, the complainant, Max W. Stochr, Eduard Stochr, who was the father of the complainant and who was a German subject residing in Germany, Hans E. Stochr, who was a brother of the complainant and who was a German subject and Georg Stochr, who was a brother of the complainant and who was a German subject residing in Germany, were co-partners engaged in business under the firm name and style of Stochr & Sons, the principal place of business of said co-partnership being in New York City, New York. Said Eduard Stochr and Georg Stochr continued thereafter to reside in Germany up to, including and subsequent to April 6, 1917, when United States of America recognized that state of war existed between the United States and the then Empire of Germany.

Fifty-second. Said Stochr & Sons were prior to February 19, 1917, the owners among other assets of 5690 shares of the capital stock of the Botany Worsted Mills.

Fifty-third. On or about February 16, 1917, there was filed in the office of the Secretary of State of the State of New York, a certificate of incorporation of a corporation Stochr & Sons, Inc., so with a capital stock of \$250,000 consisting of 2500 shares of the par value of \$100 each.

Fifty-four. On February 19, 1917, there was signed by the name of Stochr & Sons an instrument purporting to be a bill of sale of all its business, property, good will, firm name and all other assets to Stochr & Sons, Inc., which included said 5690 shares of the capital stock of the Botany Worsted Mills, which said 5690 shares of stock were thereafter transferred upon the books of the Botany Worsted Mills into the name of Stochr & Sons, Inc. The pretended consideration for said transfer of property and assets was the issuance of the entire capital stock of \$250,000 of Stochr & Sons, Inc., to or for the benefit of the former partners of Stochr & Sons in the proportions of their respective partnership interests in said firm, and the assumption by Stochr & Sons, Inc., of the debts and obligations of the partnership Stochr & Sons.

Fifty-fifth. Said stock of Stochr & Sons, Inc., was on February 19, 1917, issued as follows:

Name of stockholder.	Number of shares.
Max W. Stochr	1875
Hans E. Stochr	357.14
Max W. Stochr	223.21
Max W. Stochr	44.65

The said 1875 shares and the said 223.21 shares so issued to Max W. Stochr were issued to him as Trustee for said Eduard Stochr and said Georg Stochr respectively.

Fifty-sixth. On February 19, 1917, an instrument was signed purporting to be a voting trust agreement between said Hans E. Stoehr and said Max W. Stoehr as the stockholders of Stoehr & Sons, Inc., as parties of the first part, and said Hans E. Stoehr, said Max W. Stoehr and one Georg Rohlig, as voting trustees, as parties of the second part. Said instrument provided for the transfer and delivery of the certificates by the stockholders to the voting trustees, and that the stockholders should receive in exchange therefor trust receipts as provided in said instrument; the alleged voting trust was to continue for a period of five years from the date of said agreement, that is, until February 19, 1922; the persons named in said instrument as voting trustees were authorized to cause the stock certificates so deposited to be transferred upon the books of Stoehr & Sons, Inc., in the names of said persons as voting trustees; and the said persons as such voting trustees were to possess and be entitled to exercise all rights of every name and nature, including the right to vote, in respect to any and all such shares deposited. The holders of the trust certificates to be issued by the said persons as such voting trustees as provided in the said instrument were to be entitled to receive payments equal to the dividends, if any, collected by said persons as voting trustees upon the shares of stock of the said Company standing in their name. The said persons as voting trustees agreed to issue certificates for the number of shares transferred and delivered to them in the form set forth in Exhibit A of said instrument. Said instrument provided that at the expiration of said five years' period, to wit, after February 19, 1922, and within ten days after demand, the said persons named as voting trustees therein were upon the surrender of said trust receipts or certificates then outstanding to exchange the same for and to deliver to the then holders of said trust receipts or certificates proper certificates of the equivalent kind and amount of the common stock of said Company.

Fifty-seventh. An instrument purporting to be a voting trust certificate was thereupon issued to Max W. Stoehr as Trustee for Eduard Stoehr for 1875 shares of the stock of Stoehr & Sons, Inc., and a further instrument purporting to be a voting trust certificate was issued to Max W. Stoehr as Trustee for Georg Stoehr for 223.24 shares of the stock of Stoehr & Sons, Inc.

Fifty-eighth. On April 6, 1917, the United States of America declared that a state of war existed between the United States of America and the then Empire of Germany, and said state of war continued thereafter and has continued up to the present time, and will continue until the date of the proclamation of the exchange of ratifications of the treaties of peace, unless the President of the United States shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the end of the war.

Fifty-ninth. On or about March 8th, 1918, the Alien Property Custodian, having duly and lawfully and in accordance with the provisions of the Trading with the Enemy Act, as amended, and in

particular with the provisions of Section 7, sub-section (c) of said Act, after investigation determined that said voting trust certificate for 1875 shares of the stock of Stoehr & Sons, Inc., standing in the name of Max W. Stoehr, as Trustee for said Eduard Stoehr, and

83 said voting trust certificate for 223.21 shares of the stock of Stoehr & Sons, Inc., standing in the name of said Max W. Stoehr, as trustee for said Georg Stoehr, belonged to or were

held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President under the said Trading with the Enemy Act, duly demanded said voting trust certificates and the same were thereupon duly delivered to Passaic Trust & Safe Deposit Company, of Passaic, New Jersey, as depository for the Alien Property Custodian, and on the 28th day of March, 1919, the Alien Property Custodian seized said voting trust certificates and required the complainant to cancel both of said voting trust certificates and in lieu thereof to issue new voting trust certificates in the name of Francis P. Garvan as Alien Property Custodian, and in so doing he expressly reserved all rights acquired under or by virtue of the requirement above mentioned.

Sixtieth. The performance of the alleged contract between Stoehr & Sons and Stoehr & Sons, Inc., contemplated the delivery by Stoehr & Sons to Stoehr & Sons, Inc., of 5,690 shares of the stock of the Rotany Worsted Mills. Forty-four hundred shares of said 5,690 shares of said stock were represented by certificates which were at the time of the execution of said bill of sale in Germany. On the declaration that a state of war existed between the United States of America and the then Empire of Germany all obligations and contractual relations between the citizens of the United States and of the Empire of Germany were dissolved and abrogated and to carry out during the war any part of said alleged instrument between Stoehr & Sons and Stoehr & Sons, Inc., or any part of

84 said instrument purporting to be a voting trust agreement as above set forth, would involve intercourse with the enemy and would be illegal and upon the declaration of war as aforesaid the same was dissolved and became void and abrogated.

If any contract or agreement existed between Stoehr & Sons and Stoehr & Sons, Inc., or if any voting trust agreement existed between the stockholders of Stoehr & Sons, Inc., and the persons named in the instrument above set forth as voting trustees, the recognition by the United States of America on April 6, 1917, of the existence of a state of war between the United States of America and the then Empire of Germany dissolved the said alleged contract between Stoehr & Sons and Stoehr & Sons, Inc., and the said alleged voting trust agreement, for the reason that the performance of said alleged agreements involved trading or intercourse with the enemy as above set forth, and for the further reason that said alleged agreements upon the declaration of war as aforesaid became illegal and void as against public policy.

For a sixth, separate and distinct defense to the allegations of the bill of complaint herein, this defendant alleges and shows to the Court:

Sixty-first. Defendant repeats and realleges the allegations contained in paragraphs twenty-fifth to thirty-ninth inclusive of this answer with the same force and effect as if the allegations contained in said paragraphs were here set forth at length.

Sixty-second. This defendant further alleges with respect to said alleged contract for the purchase of said 14,900 shares by Stöhr & Sons, Inc., from Kammgarnspinnerei Stöhr & Company of Leipzig, that it was not intended to transfer the ownership of the stock of the Botany Worsted Mills to Stöhr & Sons, Inc., but it was the intention of the parties to the said alleged contract to affect merely the control of the defendant Botany Worsted Mills as between its stockholders and that the said contract had no reference to the status of such control so far as the Alien Property Custodian was concerned; that the parties to said alleged contract admitted that the control of the Botany Worsted Mills might be imperilled by a state of war between the United States of America and the then Empire of Germany because the voting right on stock of alien enemies or in which alien enemies had the beneficial interests was doubtful under the decisions of the courts, and if said Kammgarnspinnerei Stöhr & Company were deprived of said voting rights the control of the Botany Worsted Mills might be lost to such alien enemies; and that it was not the intention of the said parties that the status of such shares as far as the rights of the Government of the United States were concerned should be in anywise affected whether such shares were in Kammgarnspinnerei Stöhr & Company or in the defendant Stöhr & Sons, Inc.

86 As a seventh, separate and distinct defense to the allegations of the bill of complaint herein, this defendant alleges and shows to the Court:

Sixty-third. Defendant repeats and realleges the allegations contained in paragraphs twenty-fifth to thirty-ninth inclusive of this answer with the same force and effect as if the allegations contained in said paragraphs were here set forth at length.

Sixty-fourth. The said 14,900 shares of the capital stock of the Botany Worsted Mills hereinabove referred to, which constituted the subject matter of said instrument, Plaintiff's Exhibit 1, stood of record on the books of the Botany Worsted Mills in the name of said Kammgarnspinnerei Stöhr & Company in the year 1914 and had so stood in the name of said Company for a long time prior thereto; that in the month of February, 1915, there was delivered to the Botany Worsted Mills a letter purporting to be signed by Georg Stöhr, Vice-president of the Botany Worsted Mills, and addressed to the Treasurer of the Botany Worsted Mills at Passaic,

New Jersey, and purporting to be dated at Leipzig, Plagwitz, January 15, 1915. Said letter purported to certify that certificates representing 10,000 shares of the said 14,900 shares of the stock of the Botany Worsted Mills as aforesaid had been deposited with said Georg Stoehr, as such Vice-president, endorsed to Hans E. Stoehr, as Trustee, with the request to cause the same to be transferred upon the books of said Company to the above named

87 endorsee Hans E. Stoehr as Trustee. Said 10,000 shares were on the 15th of February, 1915, recorded on the books of the Botany Worsted Mills as having been transferred to Hans E. Stoehr as Trustee by the deposit of the certificates therefor representing the same with said Georg Stoehr as such Vice-president, at Leipzig, Germany. With reference to 4,900 shares of said 14,900 shares, the Botany Worsted Mills received a letter purporting to be signed by said Georg Stoehr, as such Vice-president, addressed to the Treasurer of the Botany Worsted Mills at Passaic, New Jersey, and purporting to be dated at Plagwitz, Leipzig, February 1, 1915. Said letter purported to certify that certificates representing said 4,900 shares had been deposited with said Georg Stoehr, as such Vice-president of the Botany Worsted Mills, endorsed to Max W. Stoehr as Trustee, with the request to cause the same to be transferred upon the books of the Company to the above named endorsee, said Max W. Stoehr as Trustee. Said 4,900 shares were on February 26, 1915, recorded on the books of the Botany Worsted Mills as having been transferred to Max W. Stoehr, as Trustee, by deposit of certificates with said Georg Stoehr, Vice-president, at Leipzig, Germany. At the time of the said alleged transfers of said 14,900 shares of stock of the Botany Worsted Mills, the said Botany Worsted Mills and the officers and directors thereof were dominated and controlled by said Hans E. Stoehr and the complainant, Max W. Stoehr, and said alleged transfers were made by the officers of said Company under the domination and control of said Hans E. Stoehr and Max W. Stoehr as aforesaid, pursuant to the scheme and conspiracy hereinafter set forth.

88 Sixty-fifth. This defendant alleges that at the time of the alleged transfer on February 20, 1917, of said 14,900 shares of said Hans E. Stoehr and said Max W. Stoehr respectively from their names as trustees to the name of Stoehr & Sons, Inc., as hereinabove set forth there was no delivery of the certificates representing said 10,000 and 4,900 shares of the stock of the Botany Worsted Mills endorsed either in blank or to specified person or persons appearing by the certificates to be the owner or owners of the shares of stock represented thereby from Hans E. Stoehr and Max W. Stoehr as Trustees to Botany Worsted Mills, and no delivery of the certificates representing the same with any separate document or documents containing a written assignment or assignments of said certificates and with no power of attorney to sell, assign or transfer the same either in blank or otherwise, and that the title to said 14,900 shares of stock attempted to be transferred by said Hans E. Stoehr and said Max W. Stoehr respectively from their names as trustees

to the same of Stoehr & Sons, Inc., as hereinbefore set forth, was not duly transferred to Stoehr & Sons, Inc., pursuant to the provisions of Chapter 191 of the Laws of 1916 of the State of New Jersey, said Act being entitled "An Act to make uniform the law of transfer of shares of stock in corporations," approved March 18, 1916.

Sixty-sixth. On February 3, 1917, diplomatic relations between the United States of America and the then Empire of Germany were severed and a state of war between said nations was then imminent and the likelihood of the commencement of said war was of common knowledge both in the United States of America and in the
89 then Empire of Germany. At the time of the execution of the said instrument of attempted transfer dated February 20, 1917, the Republic of France, the United Kingdom of Great Britain and Ireland, the Dominion of Canada, the Commonwealth of Australia and the then Empire of Germany each had exercised their sovereign right to capture enemy property on land, and this fact was well known to those who participated in the attempted execution of said instrument of February 20, 1917. It was likewise well known that in the anticipated event of the entry of the United States of America in said European war it would exercise its sovereign right to capture enemy property. Defendant alleges that the said incorporation of Stoehr & Sons, Inc., the attempted transfer of the assets of the partnership of Stoehr & Sons to Stoehr & Sons, Inc., the signing of the alleged agreement of February 20, 1917, and the attempted transfer of the said 14,900 shares of stock from the names of said Hans E. Stoehr and Max W. Stoehr as Trustees for the said Kammgarnspinnerei Stoehr & Company into the name of Stoehr & Sons, Inc., and all of the other acts and proceedings in relation to the transfer of said partnership assets and to the attempted transfer of the title or interest of Kammgarnspinnerei Stoehr & Company in said 14,900 shares hereinabove set forth, and the attempted subjection of the stock of Stoehr & Sons, Inc., to a voting trust to run for a period of five years, the voting trustees being said Max W. Stoehr, said Hans E. Stoehr and one Georg Rohling who was associated with and whose acts were dominated and controlled by the said Stoehrs, were acts done with the intent and purpose of the parties thereto to defeat the belligerent rights of the United States
90 of America, and were done and carried out in an attempt to thwart the United States of America in the exercise of its sovereign power to capture enemy property on land as well as at sea, and were all part of a conspiracy on the part of the parties thereto to defeat the belligerent rights of the United States of America as aforesaid and to prevent the United States of America from exercising its sovereign right to capture enemy property on land as well as at sea as aforesaid; and that said acts as aforesaid done or attempted to be done under said conspiracy and with said unlawful intent were contrary to public policy and were illegal and absolutely void.

Sixty-seventh. Defendant further alleges that the said acts of the complainant, Max W. Stoehr, and his brother Hans E. Stoehr who

were members of the partnership Stoehr & Sons; the instrument attempting to bind said the Kammgarnspinnerei Stoehr & Company, including the said alleged attempted transfers of said 14,900 shares of stock; the incorporation of Stoehr & Sons, Inc., the alleged transfer of the assets of the partnership Stoehr & Sons to Stoehr & Sons, Inc.; the alleged execution of the instrument of February 20, 1917, the attempted subjection of the stock of Stoehr & Sons, Inc., to a voting trust to run for a period of five years, the voting trustees being said Max W. Stoehr, said Hans E. Stoehr and one Georg Rohlig, who was associated with and whose acts were dominated and controlled by the said Stoehrs, were all part of a scheme and conspiracy to distort and hide the truth and cover up the transactions in regard to the assets of said partnership and in regard to the ownership of said 14,900 shares of stock of the Botany Worsted Mills; that the said incorporation of Stoehr & Sons, Inc., was a mere cloak and

91 shelter behind which the parties attempted to conceal the real ownership of the property above referred to in fraud of the rights of the United States as aforesaid; that the said corporation of Stoehr & Sons, Inc., was a mere tool of the complainant herein and his associates who were members of the partnership of Stoehr & Sons, and that the corporation was in fact the said persons, to wit, Max W. Stoehr, the complainant herein, and the other partners in the said partnership Stoehr & Sons; that the difference between the legal personality of the said persons and the said corporation of Stoehr & Sons, Inc., gave the corporation no greater rights than the said persons then had, and the said difference in legal personality could not and cannot be used to enable the corporation Stoehr & Sons, Inc., to become a means of fraud and a means to evade the legal responsibility and legal accountability of said persons, and cannot and could not be used as a cloak or cover to defeat the right of the United States of America to capture enemy property on land or to defeat the rights of the Alien Property Custodian to demand and receive the delivery of property held by, for, or on account of persons who are alien enemies. Looking beyond the formal corporate differences between said parties and said corporation and to the real and substantial rights rather than mere corporate organization, the ownership of said 14,900 shares of stock of the Botany Worsted Mills and the ownership of the assets of said partnership of Stoehr & Sons remained the same as it was prior to said attempted transfer by Stoehr & Sons, the partnership, to Stoehr & Sons, Inc., and the attempted transfer of the interest in said 14,900 shares from

92 Kammgarnspinnerei Stoehr & Company to Stoehr & Sons, Inc.

Sixty-eighth. The complainant has participated in an unconscionable plan or scheme to place property which would be subject to the right of confiscation by the United States in the event of war between the United States and the German Empire in the apparent situation of being entitled to protection by his Government rather than subject to confiscation.

This suit is based upon an alleged contract made as a part of and in furtherance of the said plan and this plaintiff is now asking this court to give effect to such plan and purpose.

As an eighth, separate and distinct and partial defense to the allegations of the bill of complaint herein, this defendant alleges and shows to the court:

Sixty-ninth. Defendant repeats and realleges the allegations contained in paragraphs twenty-fifth to thirty-ninth inclusive of this answer with the same force and effect as if the allegations contained in said paragraphs were here set forth at length.

Seventieth. Prior to the commencement of this suit, the Alien Property Custodian, after due investigation, duly determined
93 that the said 14,900 shares of the capital stock of the Botany Worsted Mills belonged to or were held for, on account of, or for the benefit of the Kammgarnspinnerei Stoehr & Co., which, after due investigation, he duly determined to be an enemy not holding a license granted by the President, and did require that said 14,900 shares of the capital stock of the Botany Worsted Mills be conveyed, transferred, assigned, delivered and paid over to the Alien Property Custodian, to be by him held, administered and accounted for as provided by law. This defendant further alleges that prior to the commencement of this suit the Alien Property Custodian, after due investigation, duly determined that 9510 other shares of the capital stock of the Botany Worsted Mills, other than said 14,900 shares above referred to, belonged to, or were held for, or on account of persons whom the Alien Property Custodian, determined to be enemies not holding a license granted by the President, and required that said 9510 shares of said capital stock of the Botany Worsted Mills be conveyed, transferred, assigned, delivered and paid over to the Alien Property Custodian, to be by him held, administered and accounted for as provided by law. Said 14,900 shares and said 9510 other shares above referred to, making a total of 24,410 shares, were thereupon duly transferred on the books of the Botany Worsted Mills to the Alien Property Custodian, or to his nominee, and said 24,410 shares were all the shares that the Alien Property Custodian has so demanded and so taken over.

Seventy-first. The Alien Property Custodian, prior to the commencement of this action, pursuant to the provisions of the Trading
94 with the Enemy Act, as amended, and pursuant to the executive orders and presidential proclamations issued thereunder, duly and lawfully advertised to be sold at public auction said 24,410 shares of the stock of the Botany Worsted Mills.

Seventy-second. Upon information and belief, this defendant alleges that Stoehr & Sons, Inc., is the holder of record on the books of the Botany Worsted Mills of 5,690 shares of the capital

stock of the Botany Worsted Mills, but that said 5,690 shares were and are not a part of said 24,410 shares so advertised to be sold by the Alien Property Custodian as aforesaid, nor is any part of said 5,690 shares included in said 24,410 shares advertised as aforesaid.

Seventy-third. Defendant further alleges that the board of directors of Stoehr & Sons, Inc., by means of a resolution duly adopted at a regular meeting of the said board of directors, voluntarily determined to join with the Alien Property Custodian in the said public sale as aforesaid, by offering for public sale at the time and place advertised by the Alien Property Custodian for the sale of said 24,410 shares and upon the terms and conditions of sale as promulgated by the Alien Property Custodian in connection with said sale, 1,290 shares out of the total of \$5,690 shares standing of record on the books of the Botany Worsted Mills in the name of Stoehr & Sons, Inc., as aforesaid. Pursuant to said resolution of the board of directors, said Stoehr & Sons, Inc., joined in the advertisement and offer for sale said 1,290 shares of stock of the Botany Worsted Mills at public auction at the same time and place and subject to the same terms and conditions of sale as was advertised by the Alien

95-98 Property Custodian for the sale of said 24,410 shares, so that the Alien Property Custodian and said Stoehr & Sons, Inc., jointly offered for public sale 25,700 shares of the stock of the Botany Worsted Mills. Except as aforesaid, neither said Stoehr & Sons, Inc., nor the Alien Property Custodian has offered for sale or has taken any steps towards selling or offering for sale the said 5,690 shares of the capital stock of Botany Worsted Mills standing in the name of Stoehr & Sons, Inc., on the books of the Botany Worsted Mills.

Wherefore this defendant prays that the injunction and other relief demanded in the bill of complaint herein be denied and that said bill of complaint be dismissed, with the costs and disbursements of this suit.

FRANCIS G. CAFFEY,

Solicitor for Defendant

A. Mitchell Palmer Individually,

U. S. Court and Post-Office Building,

New York City.

GEORGE L. INGRAHAM,

LEE C. BRADLEY,

Of Counsel.

99 SIR:

Please take notice that the within is a copy of the answer of the defendant, A. Mitchell Palmer, individually, which was this day filed in the office of the Clerk of the District Court of the United

States for the Southern District of New York, at the United States Court, in the Post Office Building, New York City.

Dated, New York, May 26, 1919.

Yours, etc.,

FRANCIS G. CAFFEY,
Solicitor for Defendant
A. Mitchell Palmer Individually,
Post Office Building,
New York City.

To Valentine Taylor, Esq.,
Solicitor for Complainant,
52 Wall Street,
New York City.

Service of the within answer and notice of filing is hereby admitted this 26th day of May, 1919.

Solicitor for Complainant.

[Endorsed:] A Copy this day received. May 26, 1919. House, Grossman & Vorhaus, by ———, Atty. for —. Entd. by W. Refd. to F. H.

100 District Court of the United States for the Southern District of New York.

No. 2.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in Stoehr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE et al., Defendants.

Answer of Francis P. Garvan as Alien Property Custodian.

Francis G. Caffey, Solicitor for defendant, Francis P. Garvan, as Alien Property Custodian, U. S. Court and Post Office Building, New York City.

George L. Ingraham, Lee C. Bradley, of Counsel.

U. S. District Court, S. D. of N. Y. Filed May 26, 1919.

101 District Court of the United States for the Southern District of New York.

No. 2.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in Stoehr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE, THOMAS PREHN, FERDINAND KUHN, ANDREW B. Duvall, Walter S. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney, Richard Stockton, A. Mitchell Palmer, Individually and as Alien Property Custodian; Stoehr & Sons, Inc., Botany Worsted Mills, Francis P. Garvan, and Paul Kieffer, Defendants.

Now comes the above named defendant, Francis P. Garvan, as Alien Property Custodian, and answering the bill of complaint and supplemental bill exhibited in this cause says:

102 First. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph first of the bill that Max W. Stoehr is and ever since 1910 has been a citizen of the United States and of the State of New York and an actual resident in the City and County of New York, in said State; and that the defendant Stoehr & Sons, Inc., is and ever since February 17, 1917, has been a corporation duly organized by and under the laws of the State of New York.

The said defendant admits the other allegations of paragraph first of the bill.

Second. This defendant denies the allegations of paragraph second of the bill.

Third. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph third of the bill.

Fourth. This defendant admits the allegations of paragraph fourth of the bill.

Fifth. This defendant admits the allegations of paragraph fifth of the bill.

Sixth. This defendant denies the allegations of paragraph sixth of the bill.

Seventh. This defendant denies the allegations of paragraph seventh of the bill, except that he admits that prior to February, 1915, 14,900 shares of the capital stock of the Botany Worsted Mills stood on the books of said Botany Worsted Mills in the name of

103 Kammgarnspinnerei Stoehr & Company, Aktiengesellschaft; and that on or about February 15, 1915, ten thousand (10,-

000) of said 14,900 shares of said stock were transferred on the books of the Botany Worsted Mills from the name of Kammgarnspinnerei Stoehr & Company, Aktiengesellschaft, into the name of Hans E. Stoehr, as Trustee; and that on or about February 26, 1915, the remaining 4,900 shares of said 14,900 shares were transferred on the books of the Botany Worsted Mills from the name of Kammgarnspinnerei Stoehr & Company, Aktiengesellschaft, into the name of Max W. Stoehr, as Trustee.

Eighth. This defendant denies the allegations of paragraph eighth of the bill.

Ninth. This defendant denies the allegations of paragraph ninth of the bill, except that he admits that on April 6, 1917, and December 7, 1917, respectively, the United States of America recognized that a state of war existed between the United States and the then Empire of Germany and the then Empire of Austria-Hungary, and except also that he admits that an armistice was signed on November 11, 1918.

Tenth. This defendant denies the allegations of paragraph tenth of the bill.

Eleventh. This defendant denies the allegations of paragraph eleventh of the bill.

Twelfth. This defendant denies the allegations of paragraph twelfth of the bill.

104 Thirteenth. This defendant denies the allegations of paragraph thirteenth of the bill.

Fourteenth. This defendant admits that on or about the 20th of March, 1918, the defendants Botany Worsted Mills and Stoehr & Sons, Inc., were and now are solvent, and that the said Botany Worsted Mills had a large surplus and reserve fund.

This defendant denies each and all of the other allegations of paragraph fourteenth of the bill.

Fifteenth. This defendant admits that the terms and conditions of sale of the stock of the Botany Worsted Mills advertised by the Alien Property Custodian to be sold are substantially alleged in paragraph fifteenth of the bill.

This defendant denies each and all of the other allegations and conclusions of paragraph fifteenth of the bill.

Sixteenth. This defendant denies the allegations of paragraph sixteenth of the bill.

Seventeenth. This defendant denies the allegations of paragraph seventeenth of the bill.

Eighteenth. This defendant admits that on or about November 29, 1918, there was filed in the office of the Alien Property Custodian an instrument purporting to be a notice of claim under oath under

Section 9 of the "Trading with the Enemy Act" by Max W. Stoehr, and that a copy of said instrument is annexed to the bill of complaint in this cause marked Exhibit III.

This defendant denies each and all of the other allegations of paragraph eighteenth of the bill.

105 Nineteenth. This defendant denies the allegations of fact and conclusions of paragraph nineteenth of the bill.

Twentieth. This defendant denies the allegations of fact and conclusions of paragraph twentieth of the bill.

Twenty-first. This defendant denies the allegations of paragraph first of the supplemental bill, purporting to be sworn to December 12, 1918, except that he admits that on or about December 12, 1918, a notice was filed with the Alien Property Custodian substantially in the form annexed to the supplemental bill and marked "Complainant's Supplemental Bill, Exhibit No. 1."

Twenty-second. This defendant denies the allegations of paragraph second of the supplemental bill.

Twenty-third. This defendant denies the allegations of paragraph third of the supplemental bill.

As a first, separate and distinct defense to the bill of complaint of the complainant herein, this defendant further alleges and shows to the court:

Twenty-fourth. The complainant is not a person claiming any interest, right or title in any money or other property which
103 has been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian pursuant to the provisions of the "Trading with the Enemy Act," as amended, so as to entitle the complainant to the benefit of the provisions of Section 9 of the "Trading with the Enemy Act," as amended; that the complainant is not a claimant within the meaning of said Section 9 of the "Trading with the Enemy Act," and was and is not entitled to make or file with the Alien Property Custodian a notice of his claim, under oath, or to institute a suit in equity in this Court to establish the interest, right, title or debt claimed to be due, that the plaintiff is not a person claiming any interest, right or title to the stock of the Botany Worsted Mills described in the complaint, and that therefore this Court is without jurisdiction to grant the relief prayed for in the bill herein.

For a second, separate and distinct defense to the bill of complaint of the complainant herein, the said defendant further alleges and shows to the court:

Twenty-fifth. Prior to February 15, 1915, Kammgarnspinnerei Stoehr & Co., Aktiengesellschaft of Plagwitz, Leipzig, Germany, which Company as this defendant is informed and believes was and

is a corporation organized under the laws of the then Empire of Germany, was the owner of record on the books of the Botany
 107 Worsted Mills, a corporation organized under the laws of the State of New Jersey, of 14,900 shares of the capital stock of the Botany Worsted Mills. On or about the 15th of February, 1915, there was transferred on the books of the Botany Worsted Mills 10,000 shares of the said 14,900 shares to Hans E. Stoehr as Trustee for said Kammgarnspinnerei Stoehr & Company. On or about February 23, 1915, there was transferred on the books of the Botany Worsted Mills the remaining 4,900 of said shares to Max W. Stoehr as Trustee for said Kammgarnspinnerei Stoehr & Company.

Twenty-sixth. Prior to February 19, 1917, the complainant Max W. Stoehr, Eduard Stoehr, who was the father of the complainant and who was a German subject residing in Germany, Hans E. Stoehr, who was a brother of the complainant and who was a German subject, and Georg Stoehr who was a brother of the complainant and who was a German subject residing in Germany, were partners engaged in business under the firm name and style of Stoehr & Sons. The principal place of business of said partnership was in New York City, New York.

Twenty-seventh. The purposes of said co-partnership of Stoehr & Sons as stated in the agreement of copartnership among the said partners were to do a general mercantile and commission business; to engage in the purchase, lease or sale of real or other property, including the purchase and sale of shares of stock and other securities as well as of goods and merchandise; to participate in industrial enterprises; to purchase, lease and sell and be interested in textile
 108 and other factories, and to dispose of the output of such factories; and in general to promote the interests of the partners and of their families by consolidating various property interests and to manage such property interests through the said copartnership.

Twenty-eighth. The capital of said copartnership of Stoehr & Sons as stated in said copartnership agreement was the sum of \$560,000 contributed by the various partners as follows:

Eduard Stoehr a German citizen residing in Germany..	\$420,000
Hans E. Stoehr a German citizen.....	80,000
Georg Stoehr a German citizen residing in Germany....	50,000
Max W. Stoehr the complainant herein.....	10,000
Total	<u>\$560,000</u>

Twenty-ninth. On or about February 16, 1917, there was filed in the office of the Secretary of State of New York, a certificate of incorporation of a corporation Stoehr & Sons, Inc., with an authorized capital stock of \$250,000 consisting of 2,500 shares of the par value of \$100 each. Its principal purposes as stated in the certificate of incorporation were to deal in textile products, cloth and raw material and stocks and bonds. The minutes of the first meeting of its board

of directors, held February 19, 1917, contain a resolution authorizing the issuance of the entire stock of the Company for the business, property, good will, firm name and other assets of Stoehr & Sons, the partnership above referred to, upon the assumption by Stoehr & Sons, Inc., of all the liabilities of the said partnership. The stock of said Stoehr & Sons, Inc., was issued on February 19, 1917, as follows:

Stockholder.	Number of shares.
Max W. Stoehr.....	1,875.
Hans E. Stoehr.....	357.14
Max W. Stoehr.....	223.21
Max W. Stoehr.....	44.65

The said 1,875 shares and the said 223.21 shares issued to Max W. Stoehr as aforesaid were issued to said Max W. Stoehr as Trustee, for said Eduard Stoehr and said Georg Stoehr respectively. The stock so issued was issued to or for the above named stockholders in the proportion that the said partners in said Stoehr & Sons, said co-partnership, had been interested in said partnership assets.

Thirtieth. A transfer of the assets of the said partnership of Stoehr & Sons to Stoehr & Sons, Inc., was made by what purports to be a bill of sale dated February 19, 1917, purporting to be signed "Stoehr & Sons" and witnessed by Max W. Stoehr, the complainant herein. This defendant alleges upon information and belief that the said defendant Stoehr & Sons, Inc., never obtained the title to the said assets of the partnership Stoehr & Sons by reason of said alleged bill of sale or otherwise, and that there was no valid transfer of any right, title or interest in said assets of the partnership of Stoehr & Sons to the defendant Stoehr & Sons, Inc. The partnership agreement of Stoehr & Sons contained a provision to the effect that said Eduard Stoehr and said Hans E. Stoehr should be the active partners, and said Georg Stoehr and said Max W. Stoehr should be the silent or passive partners, and that the active partners should have the right to conduct the business in such manner as they might think best, except that no transaction involving more than \$25,000 should be consummated without the written consent of all the partners. This defendant further alleges that the assets of Stoehr & Sons so attempted to be transferred to Stoehr & Sons, Inc., were largely in excess of the sum of \$25,000, and that no such written consent was ever obtained to the pretended transfer of the assets of Stoehr & Sons to Stoehr & Sons, Inc., as above set forth. This defendant further alleges that said pretended transfer of all the partnership assets of Stoehr & Sons was attempted to be made by Hans E. Stoehr and Max W. Stoehr pretending to act on behalf of all the partners, and was illegal, void and of no effect, and that the issue of the stock of the said corporation, in consideration of the said pretended assignment of the assets of the said co-partnership was ultra vires of the said corporation and void. This defendant further alleges that said transfer, if it had any validity or effect, operated only to transfer the assets of the partnership belonging to said Hans E.

Stoehr and said Max W. Stoehr individually and caused a dissolution of the partnership.

Thirty-first. On the same day, to wit, February 19, 1917, all of said 2,500 shares of stock were transferred on the books of Stoehr & Sons, Inc., to Hans E. Stoehr, Max W. Stoehr and one Georg Rohlig as voting trustees under a certain voting trust agreement dated February 19, 1917, between the stockholders of Stoehr & Sons, Inc., and said Hans E. Stoehr, said Max W. Stoehr and said Georg Rohlig, and voting trust certificates were thereupon issued by said voting trustees as follows:

Certificate holder.	Number of shares.
Max W. Stoehr, trustee.....	1875
H. E. Stoehr.....	337.14
Max W. Stoehr, trustee.....	223.21
Max W. Stoehr.....	44.65

Max W. Stoehr received and held said voting trust certificates for 1875 shares and 223.21 shares respectively as trustee for said Eduard Stoehr, a subject and resident of the then Empire of Germany, and for said Georg Stoehr, a subject and resident of the then Empire of Germany, respectively.

Thirty-second. Among the assets of the partnership of Stoehr & Sons were 5690 shares of the capital stock of the Botany Worsted Mills, which 5690 shares were subsequent to February 19, 1917, transferred on the books of the Botany Worsted Mills from Stoehr & Sons to Stoehr & Sons, Inc. Upon information and belief this defendant alleges that said Max W. Stoehr and Hans E. Stoehr through their stock ownership in the Botany Worsted Mills and through said stock ownership of Kammgarnspinnerei Stoehr & Company, controlled the election of directors and otherwise dominated and controlled the action of the Botany Worsted Mills and its officers, and the transfer of said 5690 shares on the books of the

Botany Worsted Mills from Stoehr & Sons to Stoehr & Sons, Inc., was made and brought about through said domination and control. But this defendant alleges that there was no delivery of the certificates representing 4400 shares out of said 5690 shares endorsed either in blank or to a specified person or persons appearing by the certificates to be the owner or owners of the shares of stock represented thereby from Stoehr & Sons to Stoehr & Sons, Inc., and no delivery of the certificates representing the same with any separate document or documents containing a written assignment or assignments of said certificates and with no power of attorney to sell, assign or transfer the same either in blank or otherwise, and that the title to 4400 out of said 5690 shares of stock of the Botany Worsted Mills was not transferred to Stoehr & Sons, Inc., pursuant to the provisions of Chapter 191 of the Laws of 1916 of New Jersey, said Act being entitled "An Act to make uniform the law of transfer of shares of stock in corporations," approved March 18, 1916.

Thirty-third. At the second meeting of the board of directors of Stoehr & Sons, Inc., held February 20, 1917, a resolution was passed purporting to authorize the purchase of the interest of said Kammgarnspinnerei Stoehr & Company in said 14,900 shares of the capital stock of the Botany Worsted Mills by Stoehr & Sons, Inc., from said Kammgarnspinnerei Stoehr & Company. On or about February 20, 1917, an instrument, a copy of which is attached to the bill of complaint herein marked Exhibit 1, was signed in the name of Kammgarnspinnerei Stoehr & Company, Aktiengesellschaft, by Hans E. Stoehr, and was signed in the name of Stoehr & Sons, Inc., by Georg G. Rohlig, Vice-President, which instrument pur-
113 ported to transfer the beneficial interest in the said 14,900 shares from the Kammgarnspinnerei Stoehr & Company, the beneficial owner thereof as above set forth, to the defendant Stoehr & Sons, Inc.

Thirty-fourth. The said paper set forth in the bill of complaint herein as Exhibit 1 contains a recital that \$5,000 was paid by Stoehr & Sons, Inc., to Kammgarnspinnerei Stoehr & Company, but this defendant alleges that neither said sum of \$5,000 nor any other sum whatsoever was paid by Stoehr & Sons, Inc., to the said Kammgarnspinnerei Stoehr & Company, but that said sum of \$5,000 was merely credited on the books of Stoehr & Sons, Inc., to the Botany Worsted Mills, and that said sum of \$5,000 was credited on the books of the Botany Worsted Mills to the account of Kammgarnspinnerei Stoehr & Company and debited to the account of Stoehr & Sons, Inc., and that no money or other thing of value passed from Stoehr & Sons, Inc., to Kammgarnspinnerei Stoehr & Company. Upon information and belief this defendant alleges that the crediting of said \$5,000 and the other bookkeeping entries regarding the same as set forth in this paragraph were procured and brought about through the domination and control of the Botany Worsted Mills by said Hans E. Stoehr and said Max W. Stoehr, as hereinabove set forth.

Thirty-fifth. On February 20, 1917, ten thousand (10,000) of said fourteen thousand nine hundred (14,900) shares, which had previously stood on the books of the Botany Worsted Mills in the name of Hans E. Stoehr, as Trustee for Kammgarnspinnerei Stoehr & Company, were transferred on the books of the Botany
114 Worsted Mills from his name as such trustee to the name of Stoehr & Sons, Inc. On the same day, to wit, February 20, 1917, the remaining four thousand nine hundred (4,900) of said fourteen thousand nine hundred (14,900) shares, which had previously stood upon the books of Botany Worsted Mills in the name of Max W. Stoehr as trustee for said Kammgarnspinnerei Stoehr & Company, were transferred on the books of the Botany Worsted Mills from his name as such trustee into the name of Stoehr & Sons, Inc. But this defendant alleges that there was no delivery of the certificates representing said 14,900 shares endorsed either in blank or to a specified person or persons appearing by the certificates to be the owner or owners of the shares of stock represented

thereby from said Hans E. Stoechr and Max W. Stoechr, as Trustees, to Stoechr & Sons, Inc., and no delivery of the certificates representing the same with any separate document or documents containing a written assignment or assignments of said certificates and with no power of attorney to sell, assign or transfer the same either in blank or otherwise, and this defendant alleges that the title to said 14,900 shares of stock was not transferred to Stoechr & Sons, Inc., pursuant to the provisions of Chapter 191 of the Laws of 1916 of the State of New Jersey, said Act being entitled "An Act to make uniform the law of transfer of shares of stock in corporations," approved March 18, 1916.

Thirty-sixth. This defendant further alleges that said instrument of February 20, 1917, was not executed by Kammgarnspinnerei Stoechr & Company alleged to be one of the parties thereto; that the alleged signing of said instrument was not the act of Kammgarnspinnerei Stoechr & Company; that said instrument does not
115 purport to have been signed or executed by an officer or agent of Kammgarnspinnerei Stoechr & Company; that the said Kammgarnspinnerei Stoechr & Company never by any corporate act or otherwise authorized or ratified the execution of said instrument; and that said Kammgarnspinnerei Stoechr & Company had no notice or knowledge of the existence of said alleged instrument or of the attempted transfer of its interest in said 14,900 shares of stock; and had no knowledge whatever concerning the same; but on the contrary, at the time of said attempted transfer of said interest, the relations between the United States of America and the then Empire of Germany had been broken off, and it was impossible and illegal for the complainant, or his brother Hans E. Stoechr, or any other person resident or domiciled in the United States to communicate with said Kammgarnspinnerei Stoechr & Company; that said instrument was in respect to the rights of said Kammgarnspinnerei Stoechr & Company in said 14,900 shares void and of no legal effect; that the Botany Worsted Mills and the officers and directors of said defendant Botany Worsted Mills were at the time of the attempted transfer of said 14,900 shares to Stoechr & Sons, Inc., dominated and controlled as hereinabove set forth by said Hans E. Stoechr and said Max W. Stoechr, and to carry out the illegal scheme of the parties to said alleged contract of February 20, 1917, the said Hans E. Stoechr and Max W. Stoechr caused an alleged transfer of said 14,900 shares of stock of the Botany Worsted Mills herein referred to to Stoechr & Sons, Inc., to be made upon the books of the Botany Worsted Mills; that said attempted transfer was ineffectual to transfer the title of said 14,900 shares from the Kammgarnspinnerei Stoechr & Company to Stoechr & Sons, Inc., and was void
116 ab initio and of no legal force and effect.

Thirty-seventh. This defendant alleges that from the 22nd day of October, 1917, until the 7th day of March, 1919, A. Mitchell Palmer was the Alien Property Custodian duly appointed by the President of the United States pursuant to the provisions of the Act of Congress of October 6, 1917, known as the "Trading with the enemy

Act," and that as such Alien Property Custodian, from the 22nd day of October, 1917, to the 7th day of March, 1919, the said A. Mitchell Palmer was authorized to exercise all the powers conferred upon such official by said Act as amended and by the Presidential proclamations and executive orders issued pursuant thereto. On or about the 7th day of March, 1919, the said A. Mitchell Palmer duly resigned his office of Alien Property Custodian, and Francis P. Garvan was duly appointed Alien Property Custodian pursuant to the provisions of the "Trading with the enemy Act," has duly qualified as such Alien Property Custodian and he is authorized to exercise all the powers conferred upon such official by said Act as amended by the Presidential proclamations and executive orders issued pursuant thereto.

Thirty-eighth. On or about April 5, 1918, the Alien Property Custodian, after investigation having previously determined pursuant to the provisions of said "Trading with the Enemy Act" that said 14,900 shares of the capital stock of the Botany Worsted Mills was property belonging to or held for, by, on account of, or on behalf of or for the benefit of an enemy or an ally of enemy
 117 not holding a license granted by the President under said Act, duly demanded of the defendant Botany Worsted Mills that the said 14,900 shares of stock should be transferred and delivered to the Alien Property Custodian or his nominee and on the 24th day of February, 1919, he as such official seized said shares of stock and required the Botany Worsted Mills to cancel the certificates evidencing or representing said shares of stock and in lieu thereof to issue new certificates therefor in the name of A. Mitchell Palmer, Alien Property Custodian, and in so doing he expressly reserved all rights acquired under or by virtue of the requirement above mentioned. On or about the 22nd of April, 1918, said 14,900 shares of stock were duly transferred by the Botany Worsted Mills on the books of said Company to the People's Bank and Trust Company, of Passaic, New Jersey, as depository for the Alien Property Custodian and the Botany Worsted Mills did on or about the 25th day of February, 1919, in further compliance with said requirements of said official and of the Trading with the Enemy Act, cancel said certificates theretofore issued representing said 14,900 shares of stock and in lieu thereof did issue new certificates in the name of A. Mitchell Palmer, as Alien Property Custodian. On or about March 13, 1919, the Alien Property Custodian duly demanded from Stoehr & Sons, Inc., all the rights, privileges and benefits of Kammgarnspinnerei Stoehr & Company, Actiengesellschaft, under the said contract between said Kammgarnspinnerei Stoehr & Company, Actiengesellschaft, and Stoehr & Sons, Inc., dated February 20, 1917, and duly seized said rights, privileges and benefits, expressly
 118 reserving all rights accruing under or by virtue of any demands theretofore or thereafter made with respect to said 14,900 shares.

Thirty-ninth. The Alien Property Custodian, under the provisions of said "Trading with the Enemy Act," as amended, upon the

determination of the enemy ownership of or interest in said 14,900 shares of stock as aforesaid, and upon the demand made therefor as aforesaid, and upon the seizure of the rights, privileges and benefits of the Kammgarnspinnerei Stoechr & Company as above set forth, succeeded to all the right of Kammgarnspinnerei Stoechr & Company of Leipzig in respect to said instrument, including the right of the Kammgarnspinnerei Stoechr & Company to disaffirm, repudiate, abrogate and terminate said instrument and to set aside the alleged transfer of said 14,900 shares of stock into the name of Stoechr & Sons, Inc., claimed to have been made pursuant to the terms of said instrument, and in making said determination and demands did, as the successor under the provisions of the "Trading with the Enemy Act," as amended, to the interest and rights of Kammgarnspinnerei Stoechr & Company in said 14,900 shares, repudiate, disaffirm, abrogate and terminate said instrument and did duly and lawfully cause to be set aside the alleged transfer of said 14,900 shares of stock from Kammgarnspinnerei Stoechr & Company to Stoechr & Sons, Inc., and did cause said 14,900 shares to be duly and lawfully transferred on the books of the Botany Worsted Mills to the People's Bank and Trust Company as depository of the Alien Property Custodian as aforesaid and did seize said stock and caused the certificates therefor to be cancelled and new certificates to be issued in lieu thereof to A. Mitchell Palmer, as Alien Property Custodian.

119 None of the deferred instalments of the purchase price or any part thereof was paid when due or at any other time. At the time of the making of each of the demands and seizure hereinabove in paragraphs thirty-eighth and thirty-ninth mentioned the said Stoechr & Sons, Inc., was in default as aforesaid, and the intent, purpose and legal effect of said demands and of each of them was to determine that said Stoechr & Sons, Inc., had no right, title or interest in said 14,900 shares of stock, and to exclude said Stoechr & Sons, Inc., from the enjoyment of any right, title or interest therein, as the said demands were effective to the end aforesaid, whether the right so to do arose from such default or otherwise.

As a third, separate and distinct defense to the allegations of the bill of complaint herein, this defendant alleges and shows to the Court:

Fortieth. This defendant repeats and realleges the allegations contained in paragraphs twenty-fifth to thirty-ninth inclusive of this answer with the same force and effect as if the allegations contained in said paragraphs were here set forth at length.

Forty-first. Defendant further alleges that the said instrument, Plaintiff's Exhibit 1, was absolutely void and of no effect
120 for the reason that said instrument purports to be signed on behalf of Kammgarnspinnerei Stoechr & Company by Hans E. Stoechr, and that the said Hans E. Stoechr was at the time of the alleged execution of said instrument the president and a director of and one of the chief stockholders of Stoechr & Sons, Inc., the other

party to said alleged instrument; that the attempted transfer by said instrument of the interest in said 14,900 shares of stock by the said Hans E. Stoehr and said Max W. Stoehr, who at that time stood in a fiduciary relation to the said Kammgarnspinnerei Stoehr & Company, was void and of no effect as against public policy and the rights of the beneficiary, said Kammgarnspinnerei Stoehr & Company, and of the Alien Property Custodian as successor to such beneficiary, Kammgarnspinnerei Stoehr & Company, for the reason that it was in effect an attempted transfer of the property of the principal by the fiduciaries to or for the benefit of the fiduciaries themselves as the holders or beneficial owners of stock in Stoehr & Sons, Inc., that such an attempted transfer by such trustees or fiduciaries of said 14,900 shares to Stoehr & Sons, Inc., the corporation in which they were personally interested, was and is absolutely invalid and void as against public policy; and that it was and is immaterial whether the said alleged contract or the attempted transfer of said interest thereunder was fair or for the benefit of said Kammgarnspinnerei Stoehr & Company or otherwise.

Forty-second. The Alien Property Custodian under the provisions of said "Trading with the Enemy Act," upon the determination of the enemy ownership of or interest in said 14,900 shares of stock as aforesaid, and upon demand made therefor as aforesaid, and seizure thereof as aforesaid, and upon the seizure of the rights, privileges and benefits of the Kammgarnspinnerei Stoehr & Co. as above set forth, succeeded to the rights of the Kammgarnspinnerei Stoehr & Company of Leipzig, in respect to the title and ownership of said 14,900 shares, and also in respect to said instrument, Plaintiff's Exhibit 1, including the right of the Kammgarnspinnerei Stoehr & Company to disaffirm and repudiate said instrument and to set aside the alleged transfer of the interest in said 14,900 shares of stock into the name of Stoehr & Sons, Inc., claimed to have been made pursuant to the terms of said instrument, and this defendant became vested with all the rights, interests and powers of said Kammgarnspinnerei Stoehr & Company in or with respect to said 14,900 shares of stock and said alleged instrument, Plaintiff's Exhibit 1, and in making the aforesaid determination and demands and seizure did, as the successor, under the provisions of the "Trading with the Enemy Act," to the rights and interests of Kammgarnspinnerei Stoehr & Company in said 14,900 shares and with respect to said alleged contract, repudiate and disaffirm said contract, and did duly and legally cause said 14,900 shares of stock to be transferred on the books of the Botany Worsted Mills from the name of Stoehr & Sons, Inc., to People's Bank and Trust Company of Passaic, New Jersey, as depository for the Alien Property Custodian as aforesaid, and did seize said stock and caused the certificates therefor to be cancelled and new certificates to be issued in lieu thereof to A. Mitchell Palmer, as Alien Property Custodian.

122 As a fourth, separate and distinct and partial defense to the allegations of the bill of complaint herein, this defendant alleges and shows to the Court:

Forty-third. Prior to February 15, 1915, Kammgarnspinnerei Stoehr & Company, Aktiengesellschaft, of Plagwitz, Leipzig, Germany, a corporation organized under the laws of the then Empire of Germany, was the owner in fact and of record on the books of the Botany Worsted Mills of 14,900 shares of the capital stock of the Botany Worsted Mills.

Forty-fourth. On or about February 15, 1915, there was transferred 10,000 of said 14,900 shares on the books of the Botany Worsted Mills to Hans E. Stoehr, as trustee for said Kammgarnspinnerei Stoehr & Company; and on or about February 26, 1915, there was transferred the remaining 4,900 of said shares on the books of the Botany Worsted Mills to Max W. Stoehr, as Trustee for Kammgarnspinnerei Stoehr & Company.

Forty-fifth. On or about February 16, 1917, there was filed in the office of the Secretary of State of New York, a certificate of incorporation of Stoehr & Sons, Inc., with an authorized capital stock of \$250,000 consisting of 2,500 shares of the par value of \$100 each.

123 Forty-sixth. On or about February 20, 1917, an instrument was signed in the name of Kammgarnspinnerei Stoehr & Company by Hans E. Stoehr and in the name of Stoehr & Sons, Inc., by Georg G. Rohlig, Vice-President, a copy of which instrument is annexed to the complaint and marked Complainant's Exhibit 1; that the subject matter of said instrument was said 14,900 shares of stock.

Forty-seventh. Said 14,900 shares were on or about February 20, 1917, transferred on the books of the Botany Worsted Mills from the names of Hans E. Stoehr, Trustee as aforesaid, and Max W. Stoehr, Trustee as aforesaid, respectively, to the name of Stoehr & Sons, Inc.

Forty-eighth. On or about April 5, 1918, the Alien Property Custodian, having duly and lawfully and in accordance with the provisions of the "Trading with the Enemy Act," and in particular with the provisions of Section 7, sub-section (c) of said Act, after investigation determined that said 14,900 shares of stock of Botany Worsted Mills, hereinabove referred to, belonged to or were held for, by, or on account of, or on behalf of or for the benefit of an enemy or ally of enemy not holding a license granted by the President under said "Trading with the Enemy Act," duly demanded that the Botany Worsted Mills transfer to the Alien Property Custodian said 14,900 shares of stock. Said 14,900 shares of stock were thereafter and on or about the 22nd of April, 1918, duly transferred on the books of the Botany Worsted Mills to Peoples Bank and

124 Trust Company, of Passaic, New Jersey, as depositary for the Alien Property Custodian. Said 14,900 shares stood of record on the books of the Botany Worsted Mills in the name of Peoples Bank and Trust Company, as depositary for the Alien Property Custodian until the 25th day of February, 1919.

Forty-ninth. On the the declaration that a state of war existed between the United States of America and the then Empire of Germany all obligations and contractual relations between citizens of the United States of America and of the Empire of Germany were dissolved and abrogated and to carry out during the war any part of such a contract would involve intercourse with the enemy and would be illegal and upon the declaration of war as aforesaid, the same was dissolved and became void and was abrogated.

Fiftieth. If any contract or agreement existed between Kamm-garnspinneri Stoehr & Company and Stoehr & Sons, Inc., respecting said 14,900 shares of stock, the recognition by the United States of America on April 6, 1917, of the existence of a state of war between the United States of America and the then Empire of Germany dissolved said contract between said parties, for the reason that any performance of said contract or the continuance of said contract would involve trading or intercourse with the enemy and said contract upon the declaration of war as aforesaid became illegal and void and was abrogated.

125 For a fifth, separate and distinct and partial defense to the allegations of the bill of complaint herein, this defendant alleges and shows to the Court:

Fifty-first. Prior to February 19, 1917, the complainant, Max W. Stoehr, Eduard Stoehr, who was the father of the complainant and who was a German subject residing in Germany, Hans E. Stoehr, who was a brother of the Complainant and who was a German subject and Georg Stoehr, who was a brother of the complainant and who was a German subject residing in Germany, were co-partners engaged in business under the firm name and style of Stoehr & Sons, the principal place of business of said co-partnership being in New York City, New York. Said Eduard Stoehr and Georg Stoehr continued thereafter to reside in Germany up to, including and subsequent to April 6, 1917, when United States of America recognized that state of war existed between the United States and the then Empire of Germany.

Fifty-second. Said Stoehr & Sons were prior to February 19, 1917, the owners among other assets of 5,690 shares of the capital stock of the Botany Worsted Mills.

126 Fifty-third. On or about February 16, 1917, there was filed in the office of the Secretary of State of the State of New York, a certificate of incorporation of a corporation Stoehr & Sons, Inc., with a capital stock of \$250,000 consisting of 2,500 shares of the par value of \$100 each.

Fifty-fourth. On February 19, 1917, there was signed by the name of Stoehr & Sons an instrument purporting to be a bill of sale of all its business, property, good will, firm name and all other assets to Stoehr & Sons, Inc., which included said 5,690 shares of the capital stock of the Botany Worsted Mills, which said 5,690 shares of stock were thereafter transferred upon the books of the Botany Worsted Mills into the name of Stoehr & Sons, Inc. The pretended consideration for said transfer of property and assets was the issuance of the entire capital stock of \$250,000 of Stoehr & Sons, Inc., to or for the benefit of the former partners of Stoehr & Sons in the proportions of their respective partnership interests in said firm, and the assumption by Stoehr & Sons, Inc., of the debts and obligations of the partnership Stoehr & Sons.

Fifty-fifth. Said stock of Stoehr & Sons, Inc., was on February 19, 1917, issued as follows:

Name of stockholder.	Number of shares.
Max W. Stoehr.....	1875
Hans E. Stoehr.....	357.14
Max W. Stoehr.....	223.21
Max W. Stoehr.....	44.65

The said 1,875 shares and the said 223.21 shares so issued to Max W. Stoehr were issued to him as Trustee for said Eduard Stoehr and said Georg Stoehr respectively.

Fifty-sixth. On February 19, 1917, an instrument was signed purporting to be a voting trust agreement between said Hans E. Stoehr and said Max W. Stoehr as the stockholders of Stoehr & Sons, Inc., as parties of the first part, and said Hans E. Stoehr, said Max W. Stoehr and one Georg Rohlig, as voting trustees, as parties of the second part. Said instrument provided for the transfer and delivery of the certificates by the stockholders to the voting trustees, and that the stockholders should receive in exchange therefor trust receipts as provided in said instrument; the alleged voting trust was to continue for a period of five years from the date of said agreement, that is, until February 19, 1922; the persons named in said instrument as voting trustees were authorized to cause the stock certificates so deposited to be transferred upon the books of Stoehr & Sons, Inc., in the names of said persons as voting trustees; and the said persons as such voting trustees were to possess and be entitled to exercise all rights of every name and nature, including the right to vote, in respect to any and all such shares deposited. The holders of the trust certificates to be issued by the said persons as such voting trustees as provided in the said instrument were to be entitled to receive payments equal to the dividends, if any, collected by said persons as voting trustees upon the shares of stock of the said Company standing in their name. The said persons as voting trustees agreed to issue certificates for the number of shares transferred and delivered to them in the form set forth in Exhibit

A of said instrument. Said instrument provided that at the expiration of said five years' period, to wit, after February 19, 1922, and within ten days after demand, the said persons named as voting trustees therein were upon the surrender of said trust receipts or certificates then outstanding to exchange the same for and
 128 to deliver to the then holders of said trust receipts or certificates proper certificates of the equivalent kind and amount of the common stock of said Company.

Fifty-seventh. An instrument purporting to be a voting trust certificate was thereupon issued to Max W. Stoehr as Trustee for Eduard Stoehr for 1875 shares of the stock of Stoehr & Sons, Inc., and a further instrument purporting to be a voting trust certificate was issued to Max W. Stoehr as Trustee for Georg Stoehr for 223.21 shares of the stock of Stoehr & Sons, Inc.

Fifty-eighth. On April 6, 1917, the United States of America declared that a state of war existed between the United States of America and the then Empire of Germany, and said state of war continued thereafter and has continued up to the present time, and will continue until the date of the proclamation of the exchange of ratifications of the treaties of peace, unless the President of the United States shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the end of the war.

Fifty-ninth. On or about March 8th, 1918, the Alien Property Custodian, having duly and lawfully and in accordance with the provisions of the Trading with the Enemy Act, as amended, and in particular with the provisions of Section 7, sub-section (c) of said Act, after investigation determined that said voting trust certificate for 1,875 shares of the stock of Stoehr & Sons, Inc., standing in the name of Max W. Stoehr, as Trustee for said Eduard Stoehr, and
 129 said voting trust certificate for 223.21 shares of the stock of Stoehr & Sons, Inc., standing in the name of said Max W. Stoehr, as trustee for said Georg Stoehr, belonged to or were held for, by, on account of, or on behalf, or for the benefit of an enemy or ally of enemy not holding a license granted by the President under the said Trading with the Enemy Act, duly demanded said voting trust certificates and the same were thereupon duly delivered to Passaic Trust & Safe Deposit Company, of Passaic, New Jersey, as depository for the Alien Property Custodian, and on the 28th day of March, 1919, the Alien Property Custodian seized said voting trust certificates and required the complainant to cancel both of said voting trust certificates and in lieu thereof to issue new voting trust certificates in the name of Francis P. Garvan as Alien Property Custodian, and in so doing he expressly reserved all rights acquired under or by virtue of the requirement above mentioned.

Sixtieth. The performance of the alleged contract between Stoehr & Sons and Stoehr & Sons, Inc., contemplated the delivery by Stoehr & Sons to Stoehr & Sons, Inc., of 5,690 shares of the stock of the Botany Worsted Mills. Forty-four hundred shares of said 5,690

shares of said stock were represented by certificates which were at the time of the execution of said bill of sale in Germany. On the declaration that a state of war existed between the United States of America and the then Empire of Germany all obligations and contractual relations between the citizens of the United States and of the Empire of Germany were dissolved and abrogated and to carry out during the war any part of said alleged instrument between Stoehr & Sons and Stoehr & Sons, Inc., or any part of said instrument purporting to be a voting trust agreement as above set forth, 130 would involve intercourse with the enemy and would be illegal and upon the declaration of war as aforesaid the same was dissolved and became void and abrogated.

If any contract or agreement existed between Stoehr & Sons and Stoehr & Sons, Inc., or if any voting trust agreement existed between the stockholders of Stoehr & Sons, Inc., and the persons named in the instrument above set forth as voting trustees, the recognition by the United States of America on April 6, 1917, of the existence of a state of war between the United States of America and the then Empire of Germany dissolved the said alleged contract between Stoehr & Sons and Stoehr & Sons, Inc., and the said alleged voting trust agreement, for the reason that the performance of said alleged agreements involved trading or intercourse with the enemy as above set forth, and for the further reason that said alleged agreements upon the declaration of war as aforesaid became illegal and void as against public policy.

For a sixth, separate and distinct defense to the allegations of the bill of complaint herein, this defendant alleges and shows to the court:

Sixty-first. Defendant repeats and realleges the allegations contained in paragraphs Twenty-fifth to Thirty-ninth inclusive 131 of this answer with the same force and effect as if the allegations contained in said paragraphs were here set forth at length.

Sixty-second. This defendant further alleges with respect to said alleged contract for the purchase of said 14,900 shares by Stoehr & Sons, Inc., from Kammgaruspinnerei Stoehr & Company of Leipzig, that it was not intended to transfer the ownership of the stock of the Botany Worsted Mills to Stoehr & Sons, Inc., but it was the intention of the parties to the said alleged contract to affect merely the control of the defendant Botany Worsted Mills as between its stockholders and that the said contract had no reference to the status of such control so far as the Alien Property Custodian was concerned; that the parties to said alleged contract admitted that the control of the Botany Worsted Mills might be imperilled by a state of war between the United States of America and the then Empire of Germany because the voting right on stock of alien enemies or in which alien enemies had the beneficial interests was doubtful under the decisions of the courts, and if said Kammgaruspinnerei Stoehr & Company were deprived of said voting rights

the control of the Botany Worsted Mills might be lost to such alien enemies; and that it was not the intention of the said parties that the status of such shares as far as the rights of the Government of the United States were concerned should be in anywise affected whether such shares were in Kammgarnspinnerei Stoechr & Company or in the defendant Stoechr & Sons, Inc.

132 As a seventh, separate and distinct defense to the allegations of the bill of complaint herein, this defendant alleges and shows to the Court:

Sixty-third. Defendant repeats and realleges the allegations contained in paragraphs twenty-fifth to thirty-ninth inclusive of this answer with the same force and effect as if the allegations contained in said paragraphs were here set forth at length.

Sixty-fourth. The said 14,900 shares of the capital stock of the Botany Worsted Mills hereinabove referred to, which constituted the subject matter of said instrument, Plaintiff's Exhibit 1, stood of record on the books of the Botany Worsted Mills in the name of said Kammgarnspinnerei Stoechr & Company in the year 1914 and had so stood in the name of said Company for a long time prior thereto; that in the month of February, 1915, there was delivered to the Botany Worsted Mills a letter purporting to be signed by Georg Stoechr, Vice-president of the Botany Worsted Mills, and addressed to the Treasurer of the Botany Worsted Mills at Passaic, New Jersey, and purporting to be dated at Leipzig, Plagwitz, January 15, 1915. Said letter purported to certify that certificates representing 10,000 shares of the said 14,900 shares of the stock of the Botany Worsted Mills as aforesaid had been deposited with said Georg Stoechr, as such Vice-president, endorsed to Hans E. Stoechr, as Trustee, with the request to cause the same to be transferred upon the books of said Company to the above named

133 endorsee Hans E. Stoechr as Trustee. Said 10,000 shares were on the 15th of February, 1915, recorded on the books of the Botany Worsted Mills as having been transferred to Hans E. Stoechr as Trustee by the deposit of the certificates therefor representing the same with said Georg Stoechr as such Vice-president, at Leipzig, Germany. With reference to 4,900 shares of said 14,900 shares, the Botany Worsted Mills received a letter purporting to be signed by said Georg Stoechr, as such Vice-president, addressed to the Treasurer of the Botany Worsted Mills at Passaic, New Jersey, and purporting to be dated at Plagwitz, Leipzig, February 1, 1915. Said letter purported to certify that certificates representing said 4,900 shares had been deposited with said Georg Stoechr, as such Vice-president of the Botany Worsted Mills, endorsed to Max W. Stoechr as Trustee, with the request to cause the same to be transferred upon the books of the Company to the above named endorsee, said Max W. Stoechr as Trustee. Said 4,900 shares were on February 26, 1915, recorded on the books of the Botany Worsted Mills as having been transferred to Max W. Stoechr, as Trustee, by deposit of certificates with said Georg Stoechr, Vice-president, at Leipzig, Germany. At the

time of the said alleged transfers of said 14,900 shares of stock of the Botany Worsted Mills, the said Botany Worsted Mills and the officers and directors thereof were dominated and controlled by said Hans E. Stoehr and the complainant, Max W. Stoehr, and said alleged transfers were made by the officers of said Company under the domination and control of said Hans E. Stoehr and Max W. Stoehr as aforesaid, pursuant to the scheme and conspiracy hereinafter set forth.

134 Sixty-fifth. This defendant alleges that at the time of the alleged transfer on February 20, 1917, of said 14,900 shares of said Hans E. Stoehr and said Max W. Stoehr respectively from their names as trustees to the name of Stoehr & Sons, Inc., as hereinabove set forth there was no delivery of the certificates representing said 10,000 and 4,900 shares of the stock of the Botany Worsted Mills endorsed either in blank or to specified person or persons appearing by the certificates to be the owner or owners of the shares of stock represented thereby from Hans E. Stoehr and Max W. Stoehr as Trustees to Botany Worsted Mills, and no delivery of the certificates representing the same with any separate document or documents containing a written assignment or assignments of said certificates and with no power of attorney to sell, assign or transfer the same either in blank or otherwise, and that the title to said 14,900 shares of stock attempted to be transferred by said Hans E. Stoehr and said Max W. Stoehr respectively from their names as trustees to the name of Stoehr & Sons, Inc., as hereinbefore set forth, was not duly transferred to Stoehr & Sons, Inc., pursuant to the provisions of Chapter 191 of the Laws of 1916 of the State of New Jersey, said Act being entitled "An Act to make uniform the law of transfer of shares of stock in corporations," approved March 18, 1916.

Sixty-sixth. On February 3, 1917, diplomatic relations between the United States of America and the then Empire of Germany were severed and a state of war between said nations was then imminent and the likelihood of the commencement of said war was of common knowledge both in the United States of America
135 and in the then Empire of Germany. At the time of the execution of the said instrument of attempted transfer dated February 20, 1917, the Republic of France, the United Kingdom of Great Britain and Ireland, the Dominion of Canada, the Commonwealth of Australia and the then Empire of Germany each had exercised their sovereign right to capture enemy property on land, and this fact was well known to those who participated in the attempted execution of said instrument of February 20, 1917. It was likewise well known that in the anticipated event of the entry of the United States of America in said European war it would exercise its sovereign right to capture enemy property. Defendant alleges that the said incorporation of Stoehr & Sons, Inc., the attempted transfer of the assets of the partnership of Stoehr & Sons to Stoehr & Sons, Inc., the signing of the alleged agreement of February 20, 1917, and the attempted transfer of the said 14,900

shares of stock from the names of said Hans E. Stoechr and Max W. Stoechr as Trustees for the said Kammgarnspinnerei Stoechr & Company into the name of Stoechr & Sons, Inc., and all of the other acts and proceedings in relation to the transfer of said partnership assets and to the attempted transfer of the title or interest of Kammgarnspinnerei Stoechr & Company in said 14,900 shares hereinabove set forth, and the attempted subjection of the stock of Stoechr & Sons, Inc., to a voting trust to run for a period of five years, the voting trustees being said Max W. Stoechr, said Hans E. Stoechr and one Georg Rohlig who was associated with and whose acts were dominated and controlled by the said Stoechrs, were acts done with the intent and purpose of the parties thereto to defeat the belligerent rights of the United States of America, and were

136 done and carried out in an attempt to thwart the United States of America in the exercise of its sovereign power to capture enemy property on land as well as at sea, and were all part of a conspiracy on the part of the parties thereto to defeat the belligerent rights of the United States of America as aforesaid and to prevent the United States of America from exercising its sovereign right to capture enemy property on land as well as at sea as aforesaid; and that said acts as aforesaid done or attempted to be done under said conspiracy and with said unlawful intent were contrary to public policy and were illegal and absolutely void.

Sixty-seventh. Defendant further alleges that the said acts of the complainant, Max W. Stoechr, and his brother Hans E. Stoechr who were members of the Partnership Stoechr & Sons; the instrument attempting to bind said the Kammgarnspinnerei Stoechr & Company, including the said alleged attempted transfer of said 14,900 shares of stock; the incorporation of Stoechr & Sons, Inc.; the alleged transfer of the assets of the partnership Stoechr & Sons to Stoechr & Sons, Inc.; the alleged execution of the instrument of February 20, 1917, the attempted subjection of the stock of Stoechr & Sons, Inc., to a voting trust to run for a period of five years, the voting trustees being said Max W. Stoechr, said Hans E. Stoechr and one Georg Rohlig, who was associated with and whose acts were dominated and controlled by the said Stoechrs, were all part of a scheme and conspiracy to distort and hide the truth and cover up the transactions in regard to the assets of said partnership and in regard to the ownership of said 14,900 shares of stock of the Botany Worsted Mills; that the said incorporation of Stoechr & Sons, Inc., was a
 137 mere cloak and shelter behind which the parties attempted to conceal the real ownership of the property above referred to in fraud of the rights of the United States as aforesaid; that the said corporation of Stoechr & Sons, Inc., was a mere tool of the complainant herein and his associates who were members of the partnership of Stoechr & Sons, and that the corporation was in fact the said persons, to wit, Max W. Stoechr, the complainant herein, and the other partners in the said partnership Stoechr & Sons; that the difference between the legal personality of the said persons and the said corporation of Stoechr & Sons, Inc., gave the corporation no

greater rights than the said persons then had, and the said difference in legal personality could not and cannot be used to enable the corporation Stoehr & Sons, Inc., to become a means of fraud and a means to evade the legal responsibility and legal accountability of said persons, and cannot and could not be used as a cloak or cover to defeat the right of the United States of America to capture enemy property on land or to defeat the rights of the Alien Property Custodian to demand and receive the delivery of property held by, for, or on account of persons who are alien enemies. Looking beyond the formal corporate difference between said parties and said corporation and to the real and substantial rights rather than mere corporate organization, the ownership of said 14,900 shares of stock of the Botany Worsted Mills and the ownership of the assets of said partnership of Stoehr & Sons remained the same as it was prior to said attempted transfer by Stoehr & Sons, the partnership, to Stoehr & Sons, Inc., and the attempted transfer of the interest in said 14,900 shares from Kammgarnspinnerei Stoehr & Company to Stoehr & Sons, Inc.

Sixty-eight. The complainant has participated in an unconscionable plan or scheme to place property which would be subject to the right of confiscation by the United States in the event of war between the United States and the German Empire in the apparent situation of being entitled to protection by his Government rather than subject to confiscation.

This suit is based upon an alleged contract made as a part of and in furtherance of the said plan and this plaintiff is now asking this court to give effect to such plan and purpose.

As an eighth, separate and distinct and partial defense to the allegations of the bill of complaint herein, this defendant alleges and shows to the court:

Sixty-ninth. Defendant repeats and realleges the allegations contained in paragraphs Twenty-fifth to Thirty-ninth inclusive of this answer with the same force and effect as if the allegations contained in said paragraphs were here set forth at length.

Seventieth. Prior to the commencement of this suit, the Alien Property Custodian, after due investigation, duly determined that the said 14,900 shares of the capital stock of the Botany Worsted Mills 'clonged to or were held for, on account of, or for the benefit of the Kammgarnspinnerei Stoehr & Co. which, after due investigation, he duly determined to be an enemy not holding a license granted by the President, and did require that said 14,900 shares of the capital stock of the Botany Worsted Mills be conveyed, transferred, assigned, delivered and paid over to the Alien Property Custodian, to be by him held, administered and accounted for as provided by law. This defendant further alleges that prior to the commencement of this suit the Alien Property Custodian, after due investigation, duly determined that 9,510 other shares of the capital stock of the Botany Worsted Mills, other than said

on account of persons whom the Alien Property Custodian determined to be enemies not holding a license granted by the President, and required that said 9,510 shares of said capital stock of the Botany Worsted Mills be conveyed, transferred, assigned, delivered and paid over to the Alien Property Custodian, to be by him held, administered and accounted for as provided by law. Said 14,900 shares and said 9,510 other shares above referred to, making a total of 24,410 shares, were thereupon duly transferred on the books of the Botany Worsted Mills to the Alien Property Custodian, or to his nominee, and said 24,410 shares were all the shares that the Alien Property Custodian has so demanded and so taken over.

Seventy-first. The Alien Property Custodian, prior to the commencement of this action, pursuant to the provisions of the Trading with the Enemy Act, as amended, and pursuant to the executive orders and presidential proclamations issued thereunder, duly and lawfully advertised to be sold at public auction said 24,410 shares of the stock of the Botany Worsted Mills.

Seventy-second. Upon information and belief, this defendant alleges that Stoeck & Sons, Inc., is the holder of record on the books of the Botany Worsted Mills of 5,690 shares of the capital stock of the Botany Worsted Mills, but that said 5,690 shares were and are not a part of said 24,410 shares so advertised to be sold by the Alien Property Custodian as aforesaid, nor is any part of said 5,690 shares included in said 24,410 shares advertised as aforesaid.

Seventy-third. Defendant further alleges that the board of directors of Stoeck & Sons, Inc., by means of a resolution duly adopted at a regular meeting of the said board of directors, voluntarily determined to join with the Alien Property Custodian in the said public sale as aforesaid, by offering for public sale at the time and place advertised by the Alien Property Custodian for the sale of said 24,410 shares and upon the terms and conditions of sale as promulgated by the Alien Property Custodian in connection with said sale, 1,290 shares out of the total of 5,690 shares standing of record on the books of the Botany Worsted Mills in the name of Stoeck & Sons, Inc., as aforesaid. Pursuant to said resolution of the board of directors, said Stoeck & Sons, Inc., joined in the advertisement and offer for sale said 1,290 shares of stock of the Botany Worsted Mills at public auction at the same time and place and subject to the same terms and conditions of sale as were advertised by the Alien Property Custodian for the sale of said 24,410 shares, so that the Alien Property Custodian and said Stoeck & Sons, Inc., jointly offered for public sale 25,700 shares of the stock of the Botany Worsted Mills. Except as aforesaid, neither said Stoeck & Sons, Inc., nor the Alien Property Custodian has offered for sale or has taken any steps towards selling or offering for sale the said 5,690 shares of the capital stock of Botany Worsted Mills standing in the name of Stoeck & Sons, Inc., on the books of the Botany Worsted Mills.

Wherefore this defendant prays that the injunction and other relief demanded in the bill of complaint herein be denied and that said bill of complaint be dismissed, with the costs and disbursements of this suit.

FRANCIS G. CAFFEY,

*Solicitor for Defendant Francis P. Garvan as Alien Property Custodian,
U. S. Court and Post-Office Building,
New York City.*

GEORGE L. INGRAHAM,

LEE C. BRADLEY, *Of Counsel.*

144 District Court of the United States for the Southern District of New York.

No. 2.

MAX W. STOHR, Suing in His Own Behalf as a Stockholder in Stoehr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE et al., Defendants.

Answer of Botany Worsted Mills.

John Quinn, Solicitor for defendant, Botany Worsted Mills, 31 Nassau Street, Borough of Manhattan, New York City.

John Quinn, Paul Kieffer, of Counsel.

U. S. District Court, S. D. of N. Y. Filed May 26, 1919.

145 In the District Court of the United States for the Southern District of New York.

No. 2.

MAX W. STOHR, Suing in His Own Behalf as a Stockholder in Stoehr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE, THOMAS PREHN, FERDINAND KUHN, ANDREW B. DUVALL, Walter S. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney, Richard Stockton, A. Mitchell Paimer, Individually and as Alien Property Custodian; Stoehr & Sons, Inc., Botany Worsted Mills, Francis P. Garvan, and Paul Kieffer, Defendants.

Answer of Defendant Botany Worsted Mills.

Now comes the above named defendant Botany Worsted Mills, and answering the bill of complaint and supplemental bill exhibited in this cause, says:

First. This defendant admits the allegations of paragraph first of the bill that the defendant Palmer is and at all times there-
146 inafter mentioned, was the Alien Property Custodian, having been duly appointed to such office pursuant to the Act of Congress, approved October 6, 1917, and known as the "Trading with the Enemy Act." This defendant further admits the allegations of said paragraph first of the bill that this defendant is and ever since May 11, 1899, has been a corporation duly organized by and under the laws of New Jersey, and that the persons alleged in said paragraph first to be acting as directors of this defendant are directors of this defendant.

This defendant denies that it has any knowledge or information sufficient to form a belief as to the other allegations of paragraph first of the bill.

Second. This defendant denies the allegations of paragraph second of the bill.

Third. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph third of the bill.

Fourth. This defendant admits the allegations of paragraph fourth of the bill.

Fifth. This defendant admits the allegations of paragraph fifth of the bill.

Sixth. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph sixth of the bill.

Seventh. This defendant has no knoweldge or information sufficient to form a belief as to the allegations of paragraph seventh of the bill, except that it admits that prior to February 1915 fourteen thousand nine hundred (14,900) shares of the capital stock of this defendant stood on the books of this defendant in the name of Kammgarnspinnerei Stoechr & Co., Actiengesellschaft; and that on or
147 about February 15, 1915, ten thousand (10,000) of said fourteen thousand nine hundred (14,900) shares were transferred on the books of this defendant from the name of Kammgarnspinnerei Stoechr & Co., Actiengesellschaft into the name of Hans E. Stoechr as trustee; and that on or about February 26, 1915 the remaining four thousand nine hundred (4,900) shares of said fourteen thousand nine hundred (14,900) shares were transferred on the books of this defendant from the name of Kammgarnspinnerei Stoechr & Co., Actiengesellschaft into the name of Max W. Stoechr as trustee.

Eighth. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph eighth of the bill.

Ninth. This defendant denies the allegations of paragraph ninth of the bill, except that it admits that on April 6, 1917 and December 7, 1917 respectively, the United States of America recognized that a

state of war existed between the United States and the then Empire of Germany and the then Empire of Austria-Hungary, and except also that it admits that an armistice was signed on November 11, 1918.

Tenth. This defendant denies the allegations of paragraph tenth of the bill.

Eleventh. This defendant denies the allegations of paragraph eleventh of the bill.

Twelfth. This defendant denies the allegations of paragraph twelfth of the bill.

Thirteenth. This defendant denies the allegations of paragraph thirteenth of the bill.

Fourteenth. This defendant admits that on or about the 20th of March, 1918 this defendant was and now is solvent, and that
148 this defendant had a large surplus and reserve fund and did not possess or deal in perishable property.

This defendant has no knowledge or information sufficient to form a belief as to the other allegations of paragraph fourteenth of the bill.

Fifteenth. This defendant admits that the terms and conditions of sale of the stock of this defendant advertised to be sold by the Alien Property Custodian are substantially as alleged in paragraph fifteenth of the bill.

This defendant denies that it has any knowledge or information sufficient to form a belief as to the other allegations and conclusions of paragraph fifteenth of the bill.

Sixteenth. This defendant denies the allegations of paragraph sixteenth of the bill.

Seventeenth. This defendant denies the allegations of paragraph seventeenth of the bill.

Eighteenth. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph eighteenth of the bill.

Nineteenth. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph nineteenth of the bill.

Twentieth. This defendant denies the allegations and conclusions of paragraph twentieth of the bill.

Twenty-first. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph first of the supplemental bill.

Twenty-second. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph second of the supplemental bill.

149 Twenty-third. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph third of the supplemental bill.

As a first separate and distinct defense to the bill of complaint of the complainant herein, this defendant further alleges and shows to the court:

Twenty-fourth. This defendant is and ever since May 11th, 1889 has been a corporation duly organized by and under the laws of New Jersey. The capital stock of this defendant is three million six hundred thousand dollars (\$3,600,000) and consists of thirty-six thousand shares (36,000) of the par value of one hundred dollars (\$100) each.

Twenty-fifth. The defendants, James N. Wallace, Thomas Prehn, Ferdinand Kuhn, Andrew B. Duvall, Horace C. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney and Richard Stockton, were at the time of the filing of the bill herein directors of this defendant and constituted its Board of Directors. The said directors were duly elected pursuant to the provisions of the law of New Jersey and of the articles of incorporation and the by-laws of this defendant either at adjourned annual stockholders' meetings of the company duly and legally called and held, or, for the purpose of filling vacancies then existing, at meetings of the Board of Directors of this defendant
150 duly and legally called and held. At the time of the adjourned annual meetings of the stockholders of this defendant at which meeting certain of the said directors were elected as aforesaid, the Alien Property Custodian was not a stockholder of record of this defendant and did not vote in person or by proxy at said meetings. The present members of the board of directors of this defendant elected either at the annual meeting of its stockholders held on March 18, 1919, or for the purpose of filling a vacancy then existing, at a meeting of the board of directors of the defendant duly and legally called and held, are as follows: Thomas Prehn, Ferdinand Kuhn, Andrew B. Duvall, Horace C. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, William J. Hellmer, Richard Stockton, William H. Folwell and Douglas I. McKay.

Twenty-sixth. The said members of the Board of Directors of this defendant have lawfully and in good faith administered the affairs of this defendant as such directors in the best interests of all the stockholders of this defendant.

Twenty-seventh. On or about April 5, 1918, the Alien Property Custodian having duly and lawfully and in accordance with the provision of the "Trading with the Enemy Act," and in particular with Section 7, Sub-section (c) of said act, after investigation determined that fourteen thousand nine hundred (14,900) shares of the stock of this defendant then standing of record upon the books of this defendant in the name of Stoehr & Sons, Inc., belonged to or were

held for, by, or on account of, or on behalf of, or for the benefit of, Kammgarnspinnerei Stoehr & Co., Actiengesellschaft, an enemy or ally of enemy not holding a license granted by the President under said "Trading with the Enemy Act," duly demanded that
151 this defendant transfer to the Alien Property Custodian, said fourteen thousand nine hundred (14,900) shares, and on the 24th day of February, 1919 said official seized said shares of stock and required the Botany Worsted Mills to cancel the certificates evidencing or representing said shares of stock and in lieu thereof to issue new certificates therefor in the name of A. Mitchell Palmer as Alien Property Custodian, and in so doing he expressly reserved all rights acquired under or by virtue of the requirement above mentioned. This defendant on or about the 22nd day of April, 1918, acting pursuant to the provisions of said "Trading with the Enemy Act" duly and legally transferred on the books of the Botany Worsted Mills, said fourteen thousand nine hundred (14,900) shares to Peoples Bank & Trust Company of Passaic, New Jersey, as depositary for the Alien Property Custodian. Said fourteen thousand nine hundred (14,900) shares stood of record on the books of this defendant in the name of said Peoples Bank & Trust Company as depositary for the Alien Property Custodian, until the 25th day of February 1919 on which date the Botany Worsted Mills in further compliance with said requirements of said official and of the Trading with the Enemy Act, cancelled said certificates theretofore issued, representing said 14,900 shares of stock and in lieu thereof issued new certificates in the name of A. Mitchell Palmer as Alien Property Custodian. On or about March 13, 1919 the Alien Property Custodian duly demanded from Stoehr & Sons, Inc., all the rights, privileges and benefits of Kammgarnspinnerei Stoehr & Company, Actiengesellschaft, under the said contract between said Kammgarnspinnerei Stoehr & Company, Actiengesellschaft, and Stoehr & Sons Inc., dated February 20, 1917, and duly seized said
152 rights, privileges and benefits, expressly reserving all rights accruing under or by virtue of any demands theretofore or thereafter made with respect to said 14,900 shares.

Twenty-eighth. Stoehr & Sons, Inc. was at the time of the filing of the bill herein and now is the holder of record on the books of this defendant of five thousand six hundred and ninety (5,690) shares of the stock of this defendant. The Alien Property Custodian has made no demand upon this defendant for the transfer of said five thousand six hundred and ninety (5,690) shares to the Alien Property Custodian and has made to this defendant no claim of enemy ownership in said five thousand six hundred and ninety (5,690) shares, and has made no demand upon this defendant of any kind whatsoever in regard to said five thousand six hundred and ninety (5,690) shares.

Twenty-ninth. This defendant has not heretofore participated in any manner and does not intend to participate in the offer or advertisement for the sale of stock of this defendant by the Alien Prop-

erty Custodian, as alleged in paragraph fourteenth of the bill, and has not participated and does not intend to participate in the publication, circulation and issuance of the terms and conditions on which said Alien Property Custodian proposes to sell the shares of stock so advertised by him, as alleged in paragraph fifteenth of the bill and has not participated and does not intend to participate in said sale, as alleged in said paragraph fifteenth of the bill.

153 Wherefore, this defendant prays that the said bill of complaint and supplemental bill be dismissed with the costs and disbursements of this suit.

JOHN QUINN,
Solicitor for Botany Worsted Mills,
31 Nassau Street,
Borough of Manhattan,
New York City.

JOHN QUINN,
PAUL KIEFFER,
Counsel.

154 District Court of the United States for the Southern District of New York.

No. 2.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in Stoehr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE et al., Defendants.

Answer of Directors of Botany Worsted Mills.

John Quinn, Solicitor for defendant-directors of Botany Worsted Mills, 31 Nassau Street, Borough of Manhattan, New York City.
John Quinn, Paul Kieffer, of Counsel.

U. S. District Court, S. D. of N. Y. Filed May 26, 1919.

155 In the District Court of the United States for the Southern
District of New York.

No. 2.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in
Stoehr & Sons, Inc., and in Behalf of All Others Similarly Situated,
Complainant,

against

JAMES N. WALLACE, THOMAS PREHN, FERDINAND KUHN, ANDREW
B. Duvall, Walter S. Jones, Thomas F. Martin, Thomas J. Maloney,
Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney,
Richard Stockton, A. Mitchell Palmer, Individually and as Alien
Property Custodian; Stoehr & Sons Inc., Botany Worsted Mills,
Francis P. Garvan, and Paul Kieffer, Defendants.

Answer of the Directors of the Botany Worsted Mills.

Now come the above named defendants, James N. Wallace,
Thomas Prehn, Ferdinand Kuhn, Andrew B. Duvall, Horace C.
Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell,
W. J. Hellmer, H. C. MacEldowney and Richard Stockton
156 and answering the bill of complaint and supplemental bill
exhibited in this cause, say:

First. These defendants admit the allegations of paragraph first
of the bill that the defendant Palmer is and at all times thereafter
mentioned was the Alien Property Custodian, having been duly appointed
to such office pursuant to the Act of Congress approved October 6,
1917 and known as the "Trading with the Enemy Act." These
defendants further admit the allegations of said paragraph first of
the bill that the Botany Worsted Mills is and ever since May 11,
1889 has been a corporation duly organized by and under the laws
of New Jersey and that these defendants are directors of said
Botany Worsted Mills.

These defendants deny that they have any knowledge or information
sufficient to form a belief as to the other allegations of paragraph
first of the bill.

Second. These defendants deny the allegations of paragraph second
of the bill.

Third. These defendants have no knowledge or information sufficient
to form a belief as to the allegations of paragraph third of the bill.

Fourth. These defendants admit the allegations of paragraph fourth
of the bill.

Fifth. These defendants admit the allegations of paragraph fifth
of the bill.

Sixth. These defendants have no knowledge or information sufficient to form a belief as to the allegations of paragraph sixth of the bill.

Seventh. These defendants have no knowledge, or information sufficient to form a belief as to the allegations of paragraph seventh of the bill, except that they admit that prior to February 1915
157 fourteen thousand nine hundred (14,900) shares of the capital stock of the Botany Worsted Mills stood on the books of the Botany Worsted Mills in the name of Kammgarnspinnerei Stoechr & Co., Actiengesellschaft; and that on or about February 15, 1915 ten thousand (10,000) of said fourteen thousand nine hundred (14,900) shares were transferred on the books of the Botany Worsted Mills from the name of Kammgarnspinnerei Stoechr & Co., Actiengesellschaft, into the name of Hans E. Stoechr as Trustee; and that on or about February 26, 1915 the remaining four thousand nine hundred (4,900) shares of said fourteen thousand nine hundred (14,900) shares were transferred on the books of the Botany Worsted Mills from the name of Kammgarnspinnerei Stoechr & Co., Actiengesellschaft, into the name of Max W. Stoechr, as Trustee.

Eighth. These defendants have no knowledge or information sufficient to form a belief as to the allegations of paragraph eighth of the bill.

Ninth. These defendants deny the allegations of paragraph ninth of the bill, except that they admit that on April 6, 1917 and December 7, 1917, respectively, the United States of America recognized that a state of war existed between the United States and the then Empire of Germany and the then Empire of Austria-Hungary; and expect also that they admit that an armistice was signed on November 11, 1918.

Tenth. These defendants deny the allegations of paragraph tenth of the bill.

Eleventh. These defendants deny the allegations of paragraph eleventh of the bill.

Twelfth. These defendants deny the allegations of paragraph twelfth of the bill.

Thirteenth. These defendants deny the allegations of paragraph thirteenth of the bill.

158 Fourteenth. These defendants admit that on or about the 20th of March 1918 Botany Worsted Mills was and now is solvent and that the Botany Worsted Mills had a large surplus and reserve fund and did not possess or deal in perishable property.

These defendants have no knowledge or information sufficient to form a belief as to the other allegations of paragraph fourteenth of the bill.

Fifteenth. These defendants admit that the terms and conditions of sale of the stock of the Botany Worsted Mills advertised to be sold by the Alien Property Custodian are substantially as alleged in paragraph fifteenth of the bill.

These defendants deny that they have any knowledge or information sufficient to form a belief as to the other allegations and conclusions of paragraph fifteenth of the bill.

Sixteenth. These defendants deny the allegations of paragraph sixteenth of the bill.

Seventeenth. These defendants deny the allegations of paragraph seventeenth of the bill.

Eighteenth. These defendants have no knowledge or information sufficient to form a belief as to the allegations of paragraph eighteenth of the bill.

Nineteenth. These defendants have no knowledge or information sufficient to form a belief as to the allegations of paragraph nineteenth of the bill.

Twentieth. These defendants deny the allegations and conclusions of paragraph twentieth of the bill.

Twenty-first. These defendants have no knowledge or information sufficient to form a belief as to the allegations of paragraph first of the supplemental bill.

159 Twenty-second. These defendants have no knowledge or information sufficient to form a belief as to the allegations of paragraph second of the supplemental bill.

Twenty-third. These defendants have no knowledge or information sufficient to form a belief as to the allegations of paragraph third of the supplemental bill.

As a first separate and distinct defense to the bill of complaint of the complainant herein, these defendants further allege and show to the court:

Twenty-fourth. The Botany Worsted Mills is and ever since May 11, 1889 has been a corporation duly organized by and under the laws of New Jersey. The capital stock of the Botany Worsted Mills is three million six hundred thousand dollars (\$3,600,000) and consists of thirty-six thousand (36,000) shares of the par value of one hundred dollars (\$100) each.

Twenty-fifth. These defendants were at the time of the filing of the bill herein directors of the Botany Worsted Mills and constituted its Board of Directors. These defendants were duly elected pursuant to the provisions of the law of New Jersey and of the articles of incorporation and the by laws of the Botany Worsted Mills either at adjourned annual stockholders' meetings duly and legally called.

and held or, for the purpose of filling vacancies then existing, at meetings of the board of directors of the Botany Worsted Mills duly and legally called and held. At the time of the 160 adjourned annual meetings of the stockholders of the Botany Worsted Mills, at which meetings certain of said directors were elected as aforesaid, the Alien Property Custodian, was not a stockholder of record of the Botany Worsted Mills and did not vote in person or by proxy at said meetings. The present members of the board of directors of the Botany Worsted Mills elected either at the annual meeting of its stockholders held on March 18, 1919, or for the purpose of filling a vacancy then existing, at a meeting of the board of directors of the Botany Worsted Mills duly and legally called and held, are as follows: Thomas Prehn, Ferdinand Kuhn, Andrew B. Duvall, Horace C. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, William J. Hellmer, Richard Stockton, William H. Folwell and Douglas I. McKay.

Twenty-sixth. These defendants have lawfully and in good faith administered the affairs of the Botany Worsted Mills as such directors in the best interests of all the stockholders of the Botany Worsted Mills.

Twenty-seventh. On or about April 5, 1918 the Alien Property Custodian, having duly and lawfully and in accordance with the provisions of the "Trading with the Enemy Act," and in particular with section 7, sub-section (c) of said Act, after investigation determined that fourteen thousand nine hundred (14,900) shares of the stock of the Botany Worsted Mills then standing of record upon the books of the Botany Worsted Mills in the name of Stoehr & Sons, Inc., belonged to, or were held for, by, or on account of, or on behalf of, or for the benefit of Kammgaraspinnerei Stoehr 161 & Co., Actiengesellschaft, an enemy or ally of enemy not holding a license granted by the President under said "Trading with the Enemy Act," duly demanded that the Botany Worsted Mills transfer to the Alien Property Custodian said fourteen thousand nine hundred (14,900) shares, and on the 24th day of February, 1919 said official seized said shares of stock and required the Botany Worsted Mills to cancel the certificates evidencing or representing said shares of stock and in lieu thereof to issue new certificates therefor in the name of A. Mitchell Palmer as Alien Property Custodian, and in so doing he expressly reserved all rights acquired under or by virtue of the requirement above mentioned. The Botany Worsted Mills on or about the 22nd day of April 1918, acting pursuant to the provisions of said "Trading with the Enemy Act," duly and legally transferred on the books of the Botany Worsted Mills said fourteen thousand nine hundred (14,900) shares to Peoples Bank and Trust Company of Passaic, New Jersey, as depositary for the Alien Property Custodian. Said fourteen thousand nine hundred (14,900) shares stood of record on the books of the Botany Worsted Mills in the name of said Peoples Bank and Trust Company, as depositary for the Alien Property Custodian,

until the 25th day of February, 1919 on which date the Botany Worsted Mills in further compliance with said requirements of said official and of the Trading with the Enemy Act, cancelled said certificates theretofore issued, representing said 14,900 shares of stock and in lieu thereof issued new certificates in the name of A. Mitchell Palmer as Alien Property Custodian. On or about March 13, 1919 the Alien Property Custodian duly demanded from stoehr & Sons, Inc., all the rights, privileges and benefits of Kammgarnspinnerei Stoehr & Company, Actiengesellschaft, under the said contract between said Kammgarnspinnerei Stoehr & Company, Actiengesellschaft, and Stoehr & Sons, Inc., dated February 20, 1917, and duly seized said rights, privileges and benefits, expressly reserving all rights accruing under or by virtue of any demands theretofore or thereafter made with respect to said 14,900 shares.

Twenty-eighth. Stoehr & Sons, Inc., was at the time of the filing of the bill herein and now is the holder of record on the books of the Botany Worsted Mills of five thousand six hundred and ninety (5,690) shares of stock of the Botany Worsted Mills. The Alien Property Custodian has made no demand upon the Botany Worsted Mills for the transfer of said five thousand six hundred and ninety (5,690) shares to the Alien Property Custodian, and has made to the Botany Worsted Mills no claim of enemy ownership of the said five thousand six hundred and ninety (5,690) shares, and has made no demand upon the Botany Worsted Mills of any kind whatsoever in regard to said five thousand six hundred and ninety (5,690) shares.

Twenty-ninth. The Botany Worsted Mills has not heretofore participated in any manner and does not intend to participate in the offer or advertisement for the sale of stock of the Botany Worsted Mills by the Alien Property Custodian as alleged in paragraph fourteenth of the bill, and has not participated and does not intend to participate in the publication, circulation and issuance of the terms and conditions on which said Alien Property Custodian proposes to sell the shares of stock so advertised by him as alleged in paragraph fifteenth of the bill, and has not participated and does not intend to participate in said sale as alleged in paragraph fifteenth of the bill.

163-165 Wherefore these defendants pray that the said bill of complaint and said supplemental bill be dismissed with the costs and disbursements of this suit.

JOHN QUINN,

Solicitor for the Defendants James N. Wallace, Thomas Prehn, Ferdinand Kuhn, Andrew B. Duvall, Horace C. Jones, Thomas F. Martin, Thomas J. Malony, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney, and Richard Stockton.

31 Nassau Street, New York City.

JOHN QUINN,

PAUL KIEFFER, *Counsel.*

166 District Court of the United States for the Southern District
of New York.

No. 2.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in
Stoehr & Sons, Inc., and in Behalf of All Others Similarly Sit-
uated, Complainant,

against

JAMES N. WALLACE et al., Defendants.

Answer of Directors of Stoehr & Sons, Inc.

John Quinn, Solicitor for defendant-directors of Stoehr & Sons,
Inc., 31 Nassau Street, Borough of Manhattan, New York City.
John Quinn, Paul Kieffer, of Counsel.

U. S. District Court, S. D. of N. Y. Filed May 26, 1919.

167 In the District Court of the United States for the Southern
District of New York.

No. 2.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in
Stoehr & Sons, Inc., and in Behalf of All Others Similarly Sit-
uated, Complainant,

against

JAMES N. WALLACE, THOMAS PREHN, FERDINAND KUHN, ANDREW
B. DUVALL, Walter S. Jones, Thomas F. Martin, Thomas J. Ma-
loney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney,
Richard Stockton, A. Mitchell Palmer, Individually and as Alien
Property Custodian; Stoehr & Sons, Inc., Botany Worsted Mills,
Francis P. Garvan, and Paul Kieffer, Defendants.

Answer of Directors of Stoehr & Sons, Inc.

Now come the above named defendants, James N. Wallace, An-
drew B. Duvall, Francis P. Garvan and Paul Kieffer, and
168 answering the bill of complaint and supplemental bill
exhibited in this cause, say:

First. These defendants deny that they have any knowledge or
information sufficient to form a belief as to whether Max W. Stoehr
is or has been ever since 1910 a citizen of the United States of Amer-
ica or of the State of New York or an actual resident of the City and
County of New York in said state. These defendants admit that the
defendant A. Mitchell Palmer is a citizen and resident of the City
of Stroudsburg, State of Pennsylvania. Except as in this paragraph

first expressly denied, these defendants admit all of the other allegations of paragraph first of the bill.

Second. These defendants deny the allegations of paragraph second of the bill.

Third. These defendants admit that on or about February 19, 1917, one Hans E. Stoehr, who died prior to the commencement of this action, and the complainant, Max W. Stoehr, and one George G. Rohlig, who died prior to the commencement of this action, became the holders of record on the books of Stoehr & Sons, Inc., as voting trustees of all the capital stock of Stoehr & Sons, Inc., issued and outstanding, namely twenty-five hundred (2,500) shares, and that said stock still stands on the books of Stoehr & Sons, Inc., in the names of said three voting trustees. These defendants admit that on or about February 19, 1917, said three named persons as voting trustees executed and caused to be issued to the complainant a voting trust certificate representing forty-four and sixty-five one hundredths (44.65) shares of said stock, which certificate is still outstanding in the name of the complainant. These defendants admit that since on or about February 17, 1917 Stoehr & Sons, Inc., has been a domestic corporation incorporated under the laws of New York.

169 Except as in this paragraph third expressly admitted, these defendants deny any knowledge or information sufficient to form a belief as to the other allegations of paragraph third of the bill.

Fourth. These defendants admit the allegations of paragraph fourth of the bill.

Fifth. These defendants admit the allegations of paragraph fifth of the bill.

Sixth. These defendants admit the allegations of paragraph sixth of the bill.

Seventh. These defendants admit the allegations of paragraph seventh of the bill that prior to February 15, 1915, fourteen thousand nine hundred (14,900) shares of the capital stock of the Botany Worsted Mills stood on the books of said Botany Worsted Mills in the name of Kammgarnspinnerei Stoehr & Co. Actiengesellschaft; and that on or about February 15, 1915, ten thousand (10,000) of said fourteen thousand nine hundred (14,900) shares of stock were transferred on the books of the Botany Worsted Mills from the name of Kammgarnspinnerei Stoehr & Co., Actiengesellschaft, into the name of Hans E. Stoehr, as trustee; and that on or about February 26, 1915, the remaining four thousand nine hundred (4,900) shares of said fourteen thousand nine hundred (14,900) shares were transferred on the books of the Botany Worsted Mills from the name of Kammgarnspinnerei Stoehr & Co. Actiengesellschaft into the name of Max W. Stoehr, as trustee. Except as expressly admitted in this paragraph number seventh,

these defendants deny the other allegations of paragraph seventh of the bill.

Eighth. These defendants deny the allegations of paragraph eighth of the bill.

Ninth. These defendants admit that on April 6, 1917, and December 7, 1917, respectively, the United States of America
170 recognized that a state of war existed between the United States of America and the then Empire of Germany and the then Empire of Austria-Hungary. These defendants also admit that an armistice was signed on November 11, 1918. Except as in this paragraph number ninth expressly admitted, these defendants deny all of the allegations of paragraph ninth of the bill.

Tenth. These defendants deny the allegations of paragraph tenth of the bill.

Eleventh. These defendants deny the allegations of paragraph eleventh of the bill.

Twelfth. These defendants deny any knowledge or information sufficient to form a belief as to the allegations of paragraph twelfth of the bill.

Thirteenth. These defendants deny the allegations of paragraph thirteenth of the bill.

Fourteenth. These defendants admit that on or about the 20th of March, 1918, Stoeck & Sons Inc. was and now is solvent and has a substantial undivided surplus, and that Stoeck & Sons Inc. does not possess or deal in perishable property. Except as in this paragraph number fourteenth expressly admitted, these defendants deny all of the allegations of paragraph fourteenth of the bill.

Fifteenth. These defendants admit that the terms and conditions of sale of the stock of the Botany Worsted Mills advertised to be sold by the Alien Property Custodian are substantially as alleged in paragraph fifteenth of the bill. Except as in this paragraph fifteenth expressly admitted, these defendants deny all of the allegations of paragraph fifteenth of the bill.

Sixteenth. These defendants deny the allegations of paragraph sixteenth of the bill.

171 Seventeenth. These defendants deny the allegations of paragraph seventeenth of the bill.

Eighteenth. These defendants have no knowledge or information sufficient to form a belief as to the allegations contained in paragraph eighteenth of the bill.

Nineteenth. These defendants deny the allegations of paragraph nineteenth of the bill.

Twentieth. These defendants deny the allegations of paragraph twentieth of the bill.

Twenty-first. These defendants have no knowledge or information sufficient to form a belief as to the allegations contained in paragraph first of the supplemental bill.

Twenty-second. These defendants have no knowledge or information sufficient to form a belief as to the allegations of paragraph second of the supplemental bill.

Twenty-third. These defendants have no knowledge or information to form a belief as to the allegations of paragraph third of the supplemental bill.

As a first separate and distinct defense to the bill of complaint of the complainant herein, these defendants further allege and show to the Court:

Twenty-fourth. Stoehr & Sons Inc. is a corporation organized under the laws of New York with a capital stock of two hundred and fifty thousand dollars (\$250,000), consisting of twenty-five hundred (2,500) shares of the par value of one hundred dollars (\$100) each. These defendants were at the time of the filing of the bill directors of Stoehr & Sons Inc. Francis P. Garvan was a director of Stoehr & Sons Inc. at the time of the filing of the bill and continued to act as such director until March 10, 1919, on which date he resigned as a member of the board of directors. On March 28, 1919, Douglas I. McKay was elected a director of Stoehr & Sons Inc. in the place of Francis P. Garvan. James N. Wallace, Andrew B. Duvall, Douglas I. McKay and Paul Kieffer constitute the present board of directors of Stoehr & Sons Inc. The said directors were duly and legally elected to the office of director at meetings of the board of directors of Stoehr & Sons Inc. duly and legally called and held by the directors, who in turn were duly and legally elected by the stockholders of the said Company. The said directors from the time of their election to the office of director of said Company up to the present time, have duly and lawfully administered the affairs of Stoehr & Sons Inc. in accordance with law and the articles of incorporation and the bylaws of said Company and in the best interests of said Company and of all its stockholders.

Stoehr & Sons Inc. is the owner and holder of record upon the books of the Botany Worsted Mills of five thousand six hundred and ninety (5,690) shares of the stock of the Botany Worsted Mills. Stoehr & Sons Inc. has in its possession certificates representing twelve hundred and ninety (1,290) of said five thousand six hundred ninety (5,690) shares, and was therefore in a position to deliver the same upon a sale thereof; but Stoehr & Sons Inc. has not in its possession the certificates representing the remainder, to wit, four thousand four hundred (4,400) shares out of said five thousand six hundred ninety (5,690) shares.

Twenty-fifth. Upon information and belief the Alien Property Custodian, prior to the commencement of this suit, pursuant to the provisions of the "Trading with the Enemy Act," as amended, and

pursuant to the executive orders and presidential proclamations issued thereunder, duly and lawfully advertised to be sold at public auction twenty-four thousand four hundred and ten (24,410) shares of the stock of the Botany Worsted Mills held by the Alien Property Custodian. Said twenty-four thousand four hundred and ten (24,410) shares do not include the said five thousand six hundred and ninety (5,690) shares of stock, nor any part of said shares.

Twenty-sixth. These defendants as directors of Stoechr & Sons, Inc., by a resolution duly adopted at a regular meeting of said board voted to offer for sale, at the same time and place and upon the same terms and conditions as said twenty-four thousand four hundred and ten (24,410) shares, one thousand two hundred ninety (1,290) shares out of said total of five thousand six hundred ninety (5,690) shares of stock of Botany Worsted Mills owned by said Stoechr & Sons, Inc. and standing of record in its name on the books of Botany Worsted Mills. Stoechr & Sons, Inc., thereupon joined in offering for sale as aforesaid one thousand two hundred ninety (1,290) shares with the offer for sale as aforesaid by the Alien Property Custodian of said said twenty-four thousand four hundred ten (24,410) shares to be sold as one parcel, making twenty-five thousand seven hundred (25,700) shares. Except as in this paragraph

number twenty-sixth expressly stated, neither Stoechr & Sons, Inc. nor the Alien Property Custodian has offered for sale or taken any steps towards selling or offering for sale said five thousand six hundred ninety (5,690) shares of stock of Botany Worsted Mills owned by Stoechr & Sons, Inc., or any part thereof.

As a second separate and distinct defense to the allegations of the bill of complaint herein, these defendants allege and show to the court:

Twenty-seventh. Prior to February 15, 1915, Kammgarnspinnerei Stoechr & Co., Actiengesellschaft of Plagwitz, Leipzig, Germany, a corporation organized under the laws of the then Empire of Germany, was the owner in fact and of record on the books of the Botany Worsted Mills of fourteen thousand nine hundred (14,900) shares of stock of the Botany Worsted Mills.

Twenty-eighth. On or about February 15, 1915, there was transferred ten thousand (10,000) out of said fourteen thousand nine hundred (14,900) shares on the books of the Botany Worsted Mills, to Hans E. Stoechr as trustee for said Kammgarnspinnerei Stoechr & Co., Actiengesellschaft. On or about February 26, 1915, there was transferred the remaining four thousand nine hundred (4,900) of said shares on the books of the said Botany Worsted Mills to Max W. Stoechr as trustee for Kammgarnspinnerei Stoechr & Co., Actiengesellschaft.

175 Twenty-ninth. On or about February 16, 1917, Stoechr & Sons, Inc., was organized under the laws of New York with an authorized capital stock of two hundred and fifty thousand dol-

lars (\$250,000), consisting of twenty-five hundred (2,500) shares of the par value of one hundred dollars (\$100) each. The entire capital stock of Stoehr & Sons, Inc. was issued for the business property, good will, firm name and other assets of Stoehr & Sons, a partnership theretofore existing between the complainant Max W. Stoehr and Eduard Stoehr, who was the father of the complainant and who was a German subject residing in Germany, Hans E. Stoehr, who was a brother of the complainant and who was a German subject and Georg Stoehr, who was a brother of the complainant and who was a German subject residing in Germany.

Thirtieth. On or about February 20, 1917, an instrument was signed by the name of Kammgarnspinnerei Stoehr & Co., Actiengesellschaft by Hans E. Stoehr, and in the name of Stoehr & Sons, Inc. by George G. Roehlig, Vice-President, a copy of which instrument is annexed to the complaint and marked Complainant's Exhibit 1. The subject matter of said instrument was the said fourteen thousand nine hundred (14,900) shares.

Thirty-first. Said fourteen thousand nine hundred (14,900) shares were on or about February 20, 1917, transferred on the books of the Botany Worsted Mills from the names of Hans E. Stoehr, trustee, and Max W. Stoehr, trustee, respectively, as aforesaid, to the name of Stoehr & Sons, Inc., but there was no delivery of the certificates representing said fourteen thousand nine hundred (14,900) shares endorsed either in blank or to a specified person or persons appearing by the certificate to be the owner or owners of the shares of stock represented thereby from said Hans E. Stoehr
176 and said Max W. Stoehr as such trustee, to Stoehr & Sons,

Inc., and no delivery of the certificates representing the same with any separate document or documents containing a written assignment or assignments of said certificates and with no power of attorney to sell, assign or transfer the same either in blank or otherwise, and these defendants allege that the title to said fourteen thousand nine hundred (14,900) shares was not transferred to Stoehr & Sons, Inc., pursuant to the provisions of Chapter 191 of the Laws of 1916 of New Jersey, said Act being entitled, "An Act to Make Uniform the Law of Transfer of Shares of stock in corporations," approved March 18, 1916.

Thirty-second. Upon information and belief, on or about April 5, 1918, the Alien Property Custodian, having duly and lawfully and in accordance with the provisions of the "Trading with the Enemy Act" and in particular with the provisions of Section 7, subsection (c) of said Act, after investigation determined that said fourteen thousand nine hundred (14,900) shares of stock of the Botany Worsted Mills hereinabove referred to belonged to or were held for, by, or on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President under said "Trading with the Enemy Act," duly demanded that the Botany Worsted Mills transfer to said Alien Property Custodian

todian said fourteen thousand nine hundred (14,900) shares of stock, and on the 24th day of February, 1919, said official seized said shares of stock and required the Botany Worsted Mills to cancel the certificates evidencing or representing said shares of stock and in lieu thereof to issue new certificates therefor in the name of A. Mitchell Palmer as Alien Property Custodian, and in so doing he expressly reserved all rights acquired under or by virtue of
177 the requirement above mentioned. Said fourteen thousand nine hundred (14,900) shares were on or about the 22nd of April, 1918, duly transferred on the books of the Botany Worsted Mills to Peoples Bank and Trust Company of Passaic, New Jersey, as depositary for said Alien Property Custodian. Said fourteen thousand nine hundred (14,900) shares stood of record on the books of the Botany Worsted Mills in the name of Peoples Bank and Trust Company as depositary for the Alien Property Custodian, until the 25 day of February, 1919, on which date the Botany Worsted Mills in further compliance with said requirements of said official and of the Trading with the Enemy Act, cancelled said certificates theretofore issued, representing said 14,900 shares of stock and in lieu thereof issued new certificates in the name of A. Mitchell Palmer as Alien Property Custodian. On or about March 13, 1919, the Alien Property Custodian duly demanded from Stoeck & Sons, Inc., all the rights, privileges and benefits of Kammgarnspinnerei Stoeck & Company, Actiengesellschaft, under the said contract between the Kammgarnspinnerei Stoeck & Company, Actiengesellschaft, and Stoeck & Sons, Inc., dated February 20, 1917, and duly seized said rights, privileges and benefits, expressly reserving all rights accruing under or by virtue of any demands theretofore or thereafter made with respect to said 14,900 shares.

Thirty-third. On the declaration that a state of war existed between the United States of America and the then Empire of Germany, all obligations and contractual relations between citizens of the United States of America and the subjects of the then Empire of Germany, were dissolved and abrogated, and to perform during the war any part of said contract purporting to be effected or created by said instrument would involve intercourse with the enemy
178 and would be illegal, and upon the declaration of war as aforesaid the said contract became and was illegal and became void and was abrogated.

Thirty-fourth. If any contract or agreement existed between Kammgarnspinnerei Stoeck & Co., Actiengesellschaft, and Stoeck & Sons, Inc., respecting said fourteen thousand nine hundred (14,900) shares of stock, the recognition by the United States of America on April 6, 1917, of the existence of a state of war between the United States of America and the then Empire of Germany dissolved said contract between said parties, for the reason among others that any performance of said contract or the continuance of said contract would involve trading and intercourse with the enemy.

and said contract upon the declaration of war as aforesaid became illegal and void and was abrogated.

Wherefore these defendants pray that the said Bill of Complaint and Supplemental Bill be dismissed with the costs and disbursements of this suit.

JOHN QUINN,
*Solicitor for Defendants James N.
Wallace, Andrew B. Durrall,
Francis P. Garvan, and Paul
Kieffer.*

31 Nassau Street, Borough of Manhattan, New York City.

JOHN QUINN,
PAUL KIEFFER,
Counsel.

179 District Court of the United States for the Southern District
of New York.

No. 2.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in
Stoehr & Sons, Inc., and in Behalf of All Others Similarly Sit-
uated, Complainant,

against

JAMES N. WALLACE et al., Defendants.

Answer of Stoechr & Sons, Inc.

John Quinn, Solicitor for defendant, Stoechr & Sons, Inc., 31 Nas-
sau Street, Borough of Manhattan, New York City.

John Quinn, Paul Kieffer, of Counsel.

U. S. District Court, S. D. of N. Y. Filed May 26, 1919.

180 In the District Court of the United States for the Southern District of New York.

No. 2.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in Stoehr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE, THOMAS PREHN, FERDINAND KUHN, ANDREW B. Duvall, Walter S. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney, Richard Stockton, A. Mitchell Palmer, Individually and as Alien Property Custodian; Stoehr & Sons, Inc., Botany Worsted Mills, Francis P. Garvan, and Paul Kieffer, Defendants.

Answer of Stoehr & Sons, Inc.

Now comes the above named defendant, Stoehr & Sons Inc., and answering the bill of complaint and Supplemental Bill exhibited in this cause, says:

First. This defendant denies that it has any knowledge or information sufficient to form a belief as to whether Max W. Stoehr is or has been ever since 1910 a citizen of the United States of America or of the State of New York or an actual resident of the City and County of New York in said state. This defendant admits that the defendant A. Mitchell Palmer is a citizen and resident of the City of Strudsburg, State of Pennsylvania. Except as in this paragraph first expressly denied, this defendant admits all of the other allegations in paragraph first of the bill.

Second. This defendant denies the allegations contained in paragraph second of the bill.

Third. This defendant admits that on or about February 19, 1917, one Hans E. Stoehr, who died prior to the commencement of this action, and the complainant, Max W. Stoehr, and one George G. Rohlig, who died prior to the commencement of this action, became the holders of record on the books of this defendant as voting trustees of all the capital stock of this defendant issued and outstanding, namely twenty-five hundred (2,500) shares, and that said stock still stands on the books of this defendant in the names of said three voting trustees. This defendant admits that on or about February 19, 1917 said three named persons as voting trustees executed and caused to be issued to the complainant a voting trust certificate representing forty-four and sixty-five one hundredths (44.65) shares of said stock, which certificate is still outstanding in the name of the complainant. This defendant admits that since on or about February 17, 1917 it has been a domestic corporation incorporated under the laws of the

182 State of New York. Except as in this paragraph third expressly admitted, this defendant denies any knowledge or information sufficient to form a belief as to the other allegations of paragraph third of the bill.

Fourth. This defendant admits the allegations of paragraph fourth of the bill.

Fifth. This defendant admits the allegations of paragraph fifth of the bill.

Sixth. This defendant admits the allegations of paragraph sixth of the bill.

Seventh. This defendant admits the allegations contained in paragraph seventh of the bill that prior to February 15, 1915, fourteen thousand nine hundred (14,900) shares of the capital stock of the Botany Worsted Mills stood on the books of said Botany Worsted Mills in the name of Kammgarnspinnerei Stoechr & Co. Actiengesellschaft; and that on or about February 15, 1915 ten thousand (10,000) of said fourteen thousand nine hundred (14,900) shares of stock were transferred on the books of the Botany Worsted Mills from the name of Kammgarnspinnerei Stoechr & Co., Actiengesellschaft, into the name of Hans E. Stoechr, as Trustee; and that on or about February 26, 1915, the remaining four thousand nine hundred (4,900) shares of said fourteen thousand nine hundred (14,900) shares were transferred on the books of the Botany Worsted Mills from the name of Kammgarnspinnerei Stoechr & Co. Actiengesellschaft into the name of Max W. Stoechr, as Trustee. Except as expressly admitted in this paragraph number seventh, this defendant denies the other allegations of paragraph seventh of the bill.

Eighth. This defendant denies the allegations of paragraph eighth of the bill.

183 Ninth. This defendant admits that on April 6, 1917 and December 7, 1917, respectively, the United States of America recognized that a state of war existed between the United States of America and the then Empire of Germany and the then Empire of Austria-Hungary. This defendant also admits that an armistice was signed on November 11, 1918. Except as in this paragraph number ninth expressly admitted, this defendant denies all of the allegations of paragraph ninth of the bill.

Tenth. This defendant denies the allegations of paragraph tenth of the bill.

Eleventh. This defendant denies the allegations of paragraph eleventh of the bill.

Twelfth. This defendant denies any knowledge or information sufficient to form a belief as to the allegations of paragraph twelfth of the bill.

Thirteenth. This defendant denies the allegations of paragraph thirteenth of the bill.

Fourteenth. This defendant admits that on or about the 20th day of March, 1918, it was and now is solvent and has a substantial undivided surplus, and that this defendant does not possess or deal in perishable property. Except as in this paragraph number fourteenth expressly admitted, this defendant denies all of the allegations of paragraph fourteenth of the bill.

Fifteenth. This defendant admits that the terms and conditions of sale of the stock of the Botany Worsted Mills advertised to be sold by the Alien Property Custodian are substantially as alleged in paragraph fifteenth of the bill. Except as in this paragraph fifteenth expressly admitted, this defendant denies all of the allegations of paragraph fifteenth of the bill.

184 Sixteenth. This defendant denies the allegation of paragraph sixteenth of the bill.

Seventeenth. This defendant denies the allegation of paragraph seventeenth of the bill.

Eighteenth. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph eighteenth of the bill.

Nineteenth. This defendant denies the allegations of paragraph nineteenth of the bill.

Twentieth. This defendant denies the allegations of paragraph twentieth of the bill.

Twenty-first. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph first of the supplemental bill.

Twenty-second. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph second of the supplemental bill.

Twenty-third. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph third of the supplemental bill.

As a first separate and distinct defense to the bill of complaint herein, this defendant further alleges and shows to the Court:

185 Twenty-fourth. Stoeck & Sons Inc. is a corporation organized under the laws of New York with a capital stock of two hundred and fifty thousand dollars (\$250,000), consisting of twenty-five hundred (2,500) shares of the par value of one hundred dollars (\$100) each. James N. Wallace, Andrew B. Duvall and Paul Kieffer were at the time of the filing of the bill and now are directors of Stoeck & Sons Inc. Francis P. Garvan was a director

of Stoehr & Sons Inc., at the time of the filing of the bill and continued to act as such director until March 10, 1919, on which date he resigned as a member of the board of directors. On March 28, 1919, Douglas I. McKay was elected a director of Stoehr & Sons Inc. in the place of Francis P. Garvan. James N. Wallace, Andrew B. Duvall, Douglas I. McKay and Paul Kieffer constitute the present board of directors of Stoehr & Sons Inc. Said directors were duly and legally elected to the office of director at meetings of the board of directors of Stoehr & Sons Inc. duly and legally called and held by the directors, who in turn were duly and legally elected by the stockholders of the said Company. The said directors of Stoehr & Sons Inc. from the time of their election to the office of director of said Company up to the present time have duly and lawfully administered the affairs of Stoehr & Sons Inc. in accordance with law and the articles of incorporation and the bylaws of said company and in the best interests of said Company and of all its stockholders.

Stoehr & Sons Inc. is the owner and holder of record upon the books of the Botany Worsted Mills of five thousand six hundred and ninety (5,690) shares of the stock of the Botany Worsted Mills. Stoehr & Sons Inc. has in its possession certificates representing twelve hundred and ninety (1,290) of said five thousand six hundred and ninety (5,690) shares, and was therefore in a position to deliver the same upon a sale thereof; but Stoehr & Sons Inc. has not in its possession the certificates representing the remainder, to wit, four thousand four hundred (4,400) shares out of said five thousand six hundred ninety (5,690) shares.

Twenty-fifth. Upon information and belief the Alien Property Custodian, prior to the commencement of this suit, pursuant to the provisions of the "Trading with the Enemy Act," as amended, and pursuant to the executive orders and presidential proclamations issued thereunder, duly and lawfully advertised to be sold at public auction twenty-four thousand four hundred and ten (24,410) shares of the stock of the Botany Worsted Mills held by the Alien Property Custodian. Said twenty-four thousand four hundred and ten (24,410) shares do not include the said five thousand six hundred and ninety (5,690) shares of stock, nor any part of said shares.

Twenty-sixth. Said board of directors of Stoehr & Sons Inc., by a resolution duly adopted at a regular meeting of said board voted to offer for sale, at the same time and place and upon the same terms and conditions as said twenty-four thousand four hundred and ten (24,410) shares, one thousand two hundred ninety (1,290) shares out of said total of five thousand six hundred ninety (5,690) shares of stock of Botany Worsted Mills owned by said Stoehr & Sons Inc. and standing of record in its name on the books of Botany Worsted Mills. Stoehr & Sons Inc. thereupon joined in offering for sale as aforesaid said one thousand two hundred ninety (1,290) shares with the offer for sale as aforesaid by the Alien Property Custodian of said twenty-four thousand four hundred ten (24,410) shares to be sold as one parcel, making twenty-five thousand seven

hundred (25,700) shares. Except as in this paragraph number
twenty-sixth expressly stated, neither Stoechr & Sons Inc.
187 nor the Alien Property Custodian has offered for sale or
taken any steps towards selling or offering for sale said five
thousand six hundred ninety (5,690) shares of stock of Botany
Worsted Mills owned by Stoechr & Sons Inc. or any part thereof.

As a second separate and distinct defense to the allegations of
the bill of complaint herein, this defendant alleges and shows to the
Court:

Twenty-seventh. Prior to February 15, 1915, Kammgarnspinnerei
Stoechr & Co., Actiengesellschaft of Plagwitz, Leipzig, Germany, a
corporation organized under the laws of the then Empire of Ger-
many, was the owner in fact and of record on the books of the
Botany Worsted Mills of fourteen thousand nine hundred (14,900)
shares of stock of the Botany Worsted Mills.

Twenty-eighth. On or about February 15, 1915, there was trans-
ferred ten thousand (10,000) out of said fourteen thousand nine
hundred (14,900) shares on the books of the Botany Worsted Mills,
to Hans E. Stoechr as Trustee for said Kammgarnspinnerei Stoechr
& Co., Actiengesellschaft. On or about February 26, 1915, there
was transferred the remaining four thousand nine hundred (4,900)
of said shares on the books of the said Botany Worsted Mills to Max
W. Stoechr, as Trustee for Kammgarnspinnerei Stoechr & Co., Actien-
gesellschaft.

188 Twenty-ninth. On or about February 16, 1917 Stoechr &
Sons Inc. was organized under the laws of New York with an
authorized capital stock of two hundred and fifty thousand dollars
(\$250,000), consisting of twenty-five hundred (2,500) shares of the
par value of one hundred dollars (\$100) each. The entire capital
stock of Stoechr & Sons Inc. was issued for the business property, good
will, firm name and other assets of Stoechr & Sons, a partnership
theretofore existing between the complainant Max W. Stoechr and
Eduard Stoechr, who was the father of the complainant and who was
a German subject residing in Germany, Hans E. Stoechr, who was a
brother of the complainant and who was a German subject, and
Georg Stoechr, who was a brother of the complainant and who was a
German subject residing in Germany.

Thirtieth. On or about February 20, 1917 an instrument was
signed by the name of Kammgarnspinnerei Stoechr & Co., Actiengesellschaft by Hans E. Stoechr and by the name of Stoechr & Sons Inc.
by George G. Roehlig, Vice-President, a copy of which instrument is
annexed to the complaint and marked Complainant's Exhibit 1.
The subject matter of said instrument was the said fourteen thousand
nine hundred (14,900) shares.

Thirty-first. Said fourteen thousand nine hundred (14,900)
shares were on or about February 20, 1917 transferred on the books
of the Botany Worsted Mills from the names of Hans E. Stoechr,

Trustee, and Max W. Stochr, Trustee, respectively, to the name of Stochr & Sons Inc., but there was no delivery of the certificates representing said fourteen thousand nine hundred (14,900) shares endorsed either in blank or to a specified person or persons appearing by the certificate to be the owner or owners of the shares of stock represented thereby from said Hans E. Stochr and said Max W. 180 Stochr as such Trustees, to Stochr & Sons Inc., and no delivery of the certificates representing the same with any separate document or documents containing a written assignment or assignments of said certificates and with no power of attorney to sell, assign or transfer the same either in blank or otherwise, and this defendant alleges that the title to said fourteen thousand nine hundred (14,900) shares of stock was not transferred to Stochr & Sons Inc. pursuant to the provisions of Chapter 191 of the Laws of 1916 of New Jersey, said Act being entitled, "An Act to make Uniform the Law of Transfer of Shares of Stock in Corporations," approved March 18, 1916.

Thirty-second. Upon information and belief, on or about April 5, 1918, the Alien Property Custodian, having duly and lawfully and in accordance with the provisions of the "Trading with the Enemy Act" and in particular with the provisions of Section 7, subsection (c) of said Act, after investigation determined that said fourteen thousand nine hundred (14,900) shares of stock of the Botany 190 Worsted Mills hereinabove referred to belonged to or were held for, by, or on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President under said "Trading with the Enemy Act," duly demanded that the Botany Worsted Mills transfer to said Alien Property Custodian said fourteen thousand nine hundred (14,900) shares of stock and on the 24th day of February 1919 said official seized said shares of stock and required the Botany Worsted Mills to cancel the certificates evidencing or representing said shares of stock and in lieu thereof to issue new certificates therefor in the name of A. Mitchell Palmer as Alien

Property Custodian, and in so doing he expressly reserved all 190 rights acquired under or by virtue of the requirement above mentioned. Said fourteen thousand nine hundred (14,900) shares were on or about the 22nd of April, 1918, duly transferred on the books of the Botany Worsted Mills to Peoples Bank and Trust Company of Passaic, New Jersey, as depositary for said Alien Property Custodian. Said fourteen thousand nine hundred (14,900) shares stood of record on the books of the Botany Worsted Mills in the name of Peoples Bank and Trust Company as depositary for the Alien Property Custodian, until the 25th day of February 1919 on which date the Botany Worsted Mills in further compliance with said requirements of said official and of the Trading with the Enemy Act, cancelled said certificates theretofore issued, representing said 14,900 shares of stock and in lieu thereof issued new certificates in the name of A. Mitchell Palmer as Alien Property Custodian.

On or about March 13, 1919 the Alien Property Custodian duly demanded from Stochr & Sons Inc. all the rights, privileges and

benefits of Kammgarnspinnerei Stoeck & Company, Actiengesellschaft, under the said contract between said Kammgarnspinnerei Stoeck & Company, Actiengesellschaft, and Stoeck & Sons Inc., dated February 20, 1917, and duly seized said rights, privileges and benefits, expressly reserving all rights accruing under or by virtue of any demands theretofore or thereafter made with respect to said 14,900 shares.

Thirty-third. On the declaration that a state of war existed between the United States of America and the then Empire of Germany, all obligations and contractual relations between citizens of the United States of America and the then Empire of Germany, were dissolved and abrogated, and to perform during the war any part of said contract purporting to be effected or created by said instrument would involve intercourse with the enemy and would be illegal, and upon the declaration of war as aforesaid the said contract became and was illegal and became void and abrogated.

Thirty-fourth. If any contract or agreement existed between Kammgarnspinnerei Stoeck & Co., Actiengesellschaft, and Stoeck & Sons Inc. respecting said fourteen thousand nine hundred (14,900) shares of stock, the recognition by the United States of America on April 6, 1917 of the existence of a state of war between the United States of America and the then Empire of Germany dissolved said contract between said parties, for the reason among others that any performance of said contract or the continuance of said contract would involve trading and intercourse with the enemy, and said contract upon the declaration of war as aforesaid became illegal and void and was abrogated.

Wherefore this defendant prays that the said Bill of Complaint and Supplemental Bill be dismissed with the cost and disbursements of this suit.

JOHN QUINN,

Solicitor for Defendant Stoeck & Sons, Inc.

31 Nassau Street, Borough of Manhattan, New York City.

JOHN QUINN,
PAUL KIEFFER,
Of Counsel.

192 *Statement of evidence lodged with me this Aug. 23-1920.*
ALEX. GILCHRIST, JR.,
Clerk.

E. 15-329.

In the District Court of the United States for the Southern
District of New York.

MAX W. STOHR, Suing in His Own Behalf as a Stockholder in
Stoehr & Sons, Inc., and in Behalf of All Others Similarly Sit-
uated, Complainant,

against

JAMES N. WALLACE, THOMAS PREHN, FERDINAND KUH, ANDREW
B. Duvall, Walter S. Jones, Thomas F. Martin, Thomas J. Ma-
loney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney,
Richard Stockton, A. Mitchell Palmer, Individually and as Alien
Property Custodian; Stoehr & Sons, Inc., Botany Worsted Mills,
Francis P. Garvin, and Paul Kieffer, Defendants.

*Narrative Statement of the Proceedings and of the Evidence
under Equity Rule Seventy-five.*

Be it remembered, that the above-entitled cause came on for trial
before the Honorable Learned Hand, one of the Justices of this
Court, on the 27th day of January, 1920, on the 28th day of Janu-
ary, 1920, on the 30th day of January, 1920, on the 21st day of
February, 1920, on the 27th day of February, 1920, and on the 3rd
day of March, 1920; thereupon, the following proceedings were had:

Appearances:

Valentine Taylor, solicitor for plaintiff, by Louis Marshall and
Louis J. Vorhaus, counsel.

John Quinn, solicitor for defendant Stoehr & Sons, Inc., and for
defendant directors of Stoehr & Sons, Inc., and for defendant Botany
Worsted Mills and defendant directors of Botany Worsted Mills, by
John Quinn, counsel.

Francis G. Caffey, solicitor for defendant Francis P. Garvin in-
dividually and as Alien Property Custodian, by George L. Ingra-
ham, Lee C. Bradley, and W. H. Sadler, counsel.

Francis G. Caffey, solicitor for defendant A. Mitchell Palmer, by
George L. Ingraham, Lee C. Bradley and W. H. Sadler, counsel.

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MAX W. STOEHR, the plaintiff, a witness in his own behalf, being duly sworn, testified as follows:

Direct examination.

By Mr. Vorhaus:

I am the plaintiff in this action. For the past year and a half or two years I have resided in the City of New York. Prior to that time and continuously since 1907, I resided in Passaic, New Jersey. I came to this country October 15, 1900. I have my certificate of naturalization here. (The witness produces his Certificate of Naturalization.) I became a naturalized citizen on May 25, 1911 in the Court of Common Pleas, in Paterson, New Jersey.

My brother, Hans E. Stoehr, in 1902, I think, took his definite residence in this country; he had been here once prior to that in 1890. I do not know exactly when, but he came here for the second time in 1902, intending to make his residence in this country and he lived here from 1902 until he died on March 18, 1918. He applied for citizenship; I do not know exactly when, but I know he did apply for citizenship. He took out his first papers. He then moved from New Jersey to New York, and he applied for his second papers, but he had in the meantime moved to New York and the five year limit had expired, so he could not apply for his second papers, but he had to apply for his first papers the second time.

By the Court: When was that?

A. That was in 1913, I think or the beginning of 1914.

The Witness (resuming): I am thirty-seven years of age. My brother, was, when he died, in his 41st year. He was married
194 and living here with his family since 1902, his child being American-born, and I am living in this country with my family.

Prior to February 17, 1917, the firm of Stoehr & Sons was a partnership, composed of Eduard Stoehr, and Georg Stoehr, as European partners, and Hans Stoehr and Max Stoehr, as American partners. Eduard Stoehr was my father; he is 74 years of age. Georg is a brother, about seven years older than I am. Stoehr & Sons, as a co-partnership, were engaged in the business of dealing with securities and textiles, and also with textiles themselves; it bought raw wool and sold raw wool and bought industrial papers, textile papers; it transacted business with the Botany Worsted Mills, dealing in Botany Worsted Mills stock and dealing also in raw materials for the Botany Worsted Mills.

At this point there was a colloquy between Court and the counsel, representing all the parties with a view of simplifying the record and agreeing upon the number of shares of the Botany Worsted Mills standing of record in the name of Stoehr & Sons, a co-partnership, whereupon Mr. Quinn, in behalf of the defendant, made the following statement:

"Mr. Quinn: Stoehr & Sons, the partnership were stockholders of record on the books of Botany Company prior to February 20, 1917, in the amount of 5,690 shares."

"Mr. Marshall: We will accept that statement."

The Witness: That figure accords with my recollection; that was part of the assets; that is the 5,690 shares were part of the assets of Stoehr & Sons as a partnership. I could not say how many of those shares of stock were actually in this country on February 17, 1917; nor how many of the certificates; the certificates in this country represented approximately 1,290 shares, and the rest of the certificates of that 5,690 were in Germany, as far as I know. So far as I know they were deposited in the Deutsche Bank in Leipzig, Germany. That is only recollection. I do not know how many of these certificates were in this country. I take the figures of 1,290 shares as being correct.

The Court: They all agree to that.

Thereupon Mr. Vorhaus in behalf of the plaintiff offered in evidence the certificate of incorporation of Stoehr & Sons, Incorporated, contained in the minute book of said company, which was admitted in evidence and marked Plaintiff's Exhibit No. 1; also a certain waiver of notice and minutes of the first meeting of stockholders and incorporators of said Company, which was allowed in evidence and marked Plaintiff's Exhibit No. 2, and by permission of the Court copies of said documents were substituted for the record in this case.

The Court: Now the offer, I suppose, is annexed to those minutes?

Mr. Quinn: The offer is there.

The Court: The practice ordinarily is to annex the offer.

Mr. Vorhaus: They are together here, the offer and the bill of sale.

Mr. Bradley: We object to the offer on the ground it purports to be signed by Stoehr & Sons, but there is no authority shown on the part of the European partners, Eduard Stoehr and Georg Stoehr, to the making of any such offer, and the offer includes the conveyance of all the assets of the partnership.

The Court: Well, without the consent of all the partners it would not be valid, but I think I will take it, subject to further proof.

Mr. Quinn: If that meant anything it worked a dissolution of the partnership under the law.

The Court: It probably did, but if all the partners united it would be valid. It is quite clear without the knowledge of the other partners it would not be a valid conveyance.

Mr. Vorhaus: It is not foreclosing on us, your Honor.

The Court: Would it be your proposition that two partners could sell out the assets of the firm?

Mr. Marshall: So long as there was no objection.

The Court: But in the absence of ratification it would not be valid?

Mr. Marshall: The absence of objection would be ratification.

The Court: Not at all. If they knew about it and did not state any objection, that would be ratification.

Mr. Vorhaus: That includes the offer of February 19th and also the bill of Sale.

Mr. Bradley: We object to the Bill of Sale, if the Court please, on each of the grounds mentioned in regard to the offer itself.

197 The Court: I will overrule the objection.

The offer and bill of sale by Stoehr & Sons, the partnership, to Stoehr & Sons, Inc., dated February 19, 1917, were admitted in evidence and marked plaintiff's Exhibit No. 3.

Mr. Ingraham: There is no individual signature of the copartnership?

Mr. Vorhaus: No, it is signed Stoehr & Sons.

The Court: Who signed it, Mr. Stoehr?

Q. I will show him the signature, Judge, and ask him to state who signed that. Will you please so state, Mr. Stoehr?

A. I think this is the signature of Hans E. Stoehr.

By the Court:

Q. Do you know it?

A. Yes, sir.

By Mr. Vorhaus:

Q. That is your brother that is now dead?

A. Yes, sir.

The Witness: Yes, it is the same signature, Hans E. Stoehr; I witnessed it. The signature, Max W. Stoehr, is my signature.

By the Court (addressing the witness): You were given eight shares and Mr. de Liagre got one share?

A. The stock was issued in the same part as the partners had interest in the copartnership; that is, each partner in the firm of Stoehr & Sons received and receipted for his interest in stock in the same proportion as his interest formerly was in the partnership.

Mr. Quinn: Here are the exact facts. You may verify by the Books. I will give them in three columns. The first column
198 is the number of the certificates, the second column is the issuee, and the third is the number of shares.

Certificate No. 1, Max W. Stoehr	1875
Certificate No. 2, Hans E. Stoehr	357.14
Certificate No. 3, Max W. Stoehr	223.21
Certificate No. 4, Max W. Stoehr	41.65
Total	<hr/> 2,500.00

Those shares were on the same day transferred to Hans E. Stoechr, the whole 2,500, Max W. Stoechr and George Roehlig, as voting trustees, and a certificate, which is No. 5 in the Certificate Book, was issued to the voting trustees.

The Court: For the whole sum?

Mr. Quinn: For the whole sum, and voting trust certificates were issued as follows:

No. of certificates.	Issuee.	No. of shares.
Certificate No. 1.....	Max W. Stoechr, Trustee.....	1875
Certificate No. 2.....	H. E. Stoechr	357.14
Certificate No. 3.....	Max W. Stoechr, Trustee	223.21
Certificate No. 4.....	Max W. Stoechr	44.65

Then follows in the book the following: Voting Trust Certificate No. 2 was cancelled, and the following voting trust certificates issued in place thereof:

Certificate.	Issuee.	No. of shares.
Certificate No. 5.....	George E. Roehlig	2
Certificate No. 6.....	Alfred de Liagare	2
Certificate No. 7.....	George E. Roehlig	8
Certificate No. 8.....	Alfred de Liagare	8
Certificate No. 9.....	Lotte Stoechr	100
Certificate No. 10.....	H. E. Stoechr	237.14

Mr. Marshall: Did you give the date of those last transfers?

Mr. Quinn: No; I can give you the dates. That first four voting trust certificates, Nos. 1, 2, 3, and 4, were issued on February 19, 1917, and certificates Nos. 5, 6, 7, 8, 9 and 10, which I have described, were issued July 13, 1917. They, if your Honor please, as you will see, were merely the breaking up of the ownership of H. E. Stoechr, and they did not affect the issue to the two Germans, two aliens for whom Max W. Stoechr as trustee, acted; that is, the 1,875 shares and the 223.21 shares.

By Mr. Vorhaus:

Q. After the breaking out of the war and the passage of the law known as the Trading with the Enemy Act, was a report made to the proper custodian that the stock held by you and Hans as trustee for Georg and Eduard, were held as trustee for them?

Mr. Ingraham: I object. Was that in writing?

A. A report was made immediately, in writing; it was made some time in December, as far as I remember; December of 1917, I am not certain. It was before possession was taken of any of these properties. I reported to the proper custodian that this stock which was issued for the partnership interests of Georg and Eduard was held by me as trustee for these people, as aliens.

Mr. Bradley: We object on the ground that the report is the best evidence.

The Court: I will take it. I do not see how it could be material.

Mr. Vorhaus: It is admissible on the question of good faith.

The Court: I am going to take it. It is a wide issue and I will take it. Have you it here?

Mr. Bradley: We have reports.

200 The Court: I think, Mr. Bradley, on the whole, as you are challenging the good faith and legality of the contract which was made between the German corporation and the New York corporation, I ought to take in all that they did, which they might urge to show that it was a bona fide sale, and they were not trying to evade the law.

Mr. Ingraham: Of course, this was only after the contract was made.

The Court: So it was.

Mr. Ingraham: I have no objection to your Honor's taking it.

The Court: It is quite clear I should not rule on the proofs.

Mr. Ingraham: The law requires all these corporations to make these reports and there was a severe penalty for not making them.

The Court: I do not say how good proof it will be.

Mr. Ingraham: I have not any objection to your Honor's taking it, except under the circumstances I would like to have a formal objection noted.

The Court: You have your record. I have overruled the objection. As I said first to Mr. Bradley, I do not see just how it could be material, but on reflection, it seems to me it might be material.

If their conduct was unexceptional and in compliance with the
201 law, they may argue that.

Mr. Vorhaus: Report by Stoehr & Sons, Inc., to the Alien Property Custodian is dated December 6, 1917. The Act was passed October 6th. This report is made, if your Honor please, pursuant to Section 7A of the Trading with the Enemy Act approved October 6, 1917, and transmits certain information. It is accompanied by a letter. The witness identified his signature to the report and it was offered in evidence as plaintiff's Exhibit No. 4.

In response to the Court's Question, the witness stated that Lotte Stoehr was the widow of Hans E. Stoehr.

In response to a question by Mr. Vorhaus, the witness stated that his brother Hans died on the 18th of March, 1918.

Mr. Vorhaus: I offer in evidence the Voting Trust Agreement, dated the 19th of February, 1917.

Mr. Quinn: If your Honor please, I will enter a formal objection there. I think that is without authority to bind the two Germans, whose interests were purporting to be dealt with the partners of Max Stoehr here.

Mr. Ingraham: I take an objection on behalf of all the defendants.

The Court: Objection overruled.

The Voting Trust Agreement was thereupon admitted in evidence as plaintiff's Exhibit No. 5.

The Witness (resuming): The Botany Worsted Mills Corporation was organized on May 11, 1889, under the laws of New Jersey for the business of the spinning of wool and worsted and yarns and the manufacture of dress goods and men's wear.

202 At this point the allegations of the fifth paragraph of the bill of complaint were admitted by the defendants.

The Witness (resuming): The mill had grown in the 1890's very rapidly, and had passed over the very bad years of 1900 in a very good condition, and had grown to be a plant employing almost 7,000 people.

By the Court:

Q. When was that, Mr. Stoehr?

A. Up to 1914, and up to 1917, I may say, the end of 1916. It was very prosperous and was engaged in the manufacture of dress goods mostly. It was equipped for such purposes with a very small men's wear department. It has been charged several times in the newspapers that the Botany Worsted Mills did no work for the Government. I may state that in 1916, already, before the United States came into the war, the plant had a very large contract with the Navy Department, with the Marines, for uniforms, and blue Kersey.

By Mr. Vorhaus:

The Witness (resuming): That was before we got into the war. It manufactured worsted yarns, which together with cotton, we worked into underwear for the Army and Navy. The part of the plant being mostly equipped for ladies' wear, of course, we did not run that part of the machinery which was not equipped for men's wear or for Army goods, even in the first part of the year 1917 for the purpose it was made for. We could not manufacture efficiently

203 Army goods on those looms, but we manufactured very efficiently worsted yarns for underwear, as I have stated before, in the first part of the year, before Mr. Palmer took the plant over.

The Witness (resuming): Before the outbreak of the war, in 1917, we employed very close to 7,000 men, I do not think the figure ever reached the actual 7,000, but it was 6,800 and some odd men. The plant, as far as I remember, has about 140 acres of ground and I do not know exactly how much there is under roof. It is a very large plant. We have 2,100 and some odd looms; we have about 90,000 spindles, worsted spindles, and 10,000 woolen spindles. To some extent, the machinery that the Botany Worsted Mills had was the same kind of machinery that is used in other mills in this country. We prided ourselves that we were very efficient in every way and

very well equipped and that the machinery was kept in very good order and it has always been stated as such. Prior to the time Mr. Palmer took possession of the Botany Worsted Mills, I think the volume of business in 1917 was \$28,000,000 as far as I recall the figures.

204 Mr. Quinn, for the defendants, admitted that the Botany Worsted Mills Co. had large assets and was a prosperous business and promised to produce the balance sheet later.

It was stipulated by counsel that on the books of the Botany Worsted Mills, 5,690 shares of the stock of the Botany Worsted Mills stood in the name of Stoehr & Sons, the partnership prior to and on February 17, 1917, and that on February 20th, 1917, the total of 5,690 shares were transferred into the name of Stoehr & Sons, Incorporated. This admission was made by counsel for the defendants without conceding the validity of such transfers, or that the by-laws were complied with or the certificates produced.

Whereupon, Mr. Vorhaus, as counsel for the plaintiff, called upon the defendants to produce the original certificates representing 1,290 shares out of said 5,690 shares of stock of the Botany Worsted Mills. Mr. Quinn, as counsel for the defendants, responded that he, as counsel for the defendant Stoehr & Sons, Inc., did not have such certificates in his possession.

Whereupon, by consent of the parties, Mr. Vorhaus in behalf of the plaintiff, introduced in evidence a form of stock certificate showing the form of stock certificate used by the Botany Worsted Mills, which document was marked plaintiff's Exhibit 6. Mr. Quinn in response to an inquiry of Mr. Marshall, counsel for the plaintiff, stated that the certificates for the said 1,290 shares were in the possession of the Treasurer of Stoehr & Sons, Inc.

The Witness (resuming): I am a stockholder of Stoehr & Sons, Incorporated, to the extent of 44 shares and have never relinquished my interest in that stock.

The Court: It is admitted by the defendant that it appears on the books of the Company (The Botany Worsted Mills) that 14,900 shares were registered, 10,000 in the name of Hans E. Stoehr and 4,900 shares in the name of Max W. Stoehr. The date of the 10,000 shares transferred in the name of Hans E. Stoehr, 205 trustee, was January 15, 1915, and the date of the transfer to Max W. Stoehr of the 4,900 shares was February 25, 1915, and that this admission is without conceding the validity of the transfer to effect a change of legal title.

Mr. Quinn: The date of the transfer to Max W. Stoehr I find was February 26, 1915, the transfer of 4,900 shares on the books of the company.

Whereupon, Mr. Vorhaus called for the production of the Agreement marked Exhibit I and annexed to the bill of complaint, and offered in evidence a waiver of notice of meeting and minutes of meeting of directors of Stoehr & Sons, Incorporated, held February

20, 1917, and also the contract which is Exhibit I attached to the complaint, dated February 20, 1917.

Mr. Bradley: To the contract we object.

The Court: What is the date of that meeting?

Mr. Vorhaus: February 20th.

The Court: Now, of course, you object to the contract. The best way would be to take it over objections.

Mr. Bradley: May we state the grounds of objection now, your Honor?

The Court: If you like.

Mr. Bradley: The grounds of objection are first the agreement of Hans E. Stoehr does not purport on its face to be done by an officer or agent of the corporation or anyone in matter authorized; second, that there is no evidence of any authority on the part of Hans E. Stoehr to enter into the agreement on the part of the German corporation; third, that the agreement was with a corporation in which Hans E. Stoehr was interested and of which he
206 was President—

The Court: I will overrule that and take your exception so that your record will be straight.

Mr. Bradley: I want to state as ground four, the contract does not affect the proprietary interest in the subject matter thereof.

Mr. Ingraham: And did not transfer to the New York Corporation the title to these shares.

Mr. Quinn: It does not represent the honest intention of the parties to it. It never intended to do what on the face of it it purported to do, and that it was a sham and a fraud.

Waiver of Notice and Minutes of Meeting of February 20th, marked plaintiff's Exhibit 7.

Agreement marked plaintiff's Exhibit No. 8.

By Mr. Vorhaus:

Q. Now, will you please state what position, if any, Hans E. Stoehr, your brother, held in this German Company called the Kammgarn-Spinnerei Stoehr Company?

Mr. Ingraham: We object to that. He cannot testify on personal knowledge of it.

Mr. Vorhaus: If your Honor please, Hans is dead, the books are over in Germany, the original records, and I know of no other way to prove that except this way, and I think your Honor ought
207 to receive it for what it is worth.

Mr. Ingraham: It is a perfectly simple proposition that no agent can ever prove his agency by his admissions. This is all this man could do. He was in America; had not anything to do with the German Company, and all he could know was what Hans told him or what somebody else told him.

By the Court:

Q. Have you any connection with the Kammgarn-Spinnerei Stoehr Company?

A. Yes, sir, I am a large stockholder in the Kammgarn-Spinnerei Stoehr Company.

Mr. Vorhaus: I think he has more than secondary knowledge of it.

The Court: See whether he has.

By Mr. Vorhaus:

Q. What knowledge have you of what position or relation your brother Hans had with the Kammgarn-Spinnerei Stoehr Company?

Mr. Ingraham: I object to that, sir. They want to get in somehow or other evidence of authority of Hans to represent this German Company in Germany and this witness has all this time been in this country. He attended no meetings of the German Company, he could not have any—it appears upon its face he could not have any knowledge, and any authority must necessarily be in writing. Both this witness and his brother were in this country. The others were in Germany; the German company was in Germany and it is not possible that this witness could have any knowledge of the action of the German Company, except it was in writing
208 and transmitted here, and then that is the best evidence.

The Court: No, that would not necessarily be so. If there were transactions in which he was a party between the Kammgarn-Spinnerei Company and himself, or the Stoehr Company here, in which his brother Hans acted, then those transactions went on certainly if they were on over a period of time, he might have what I would hold was sufficient basis, he might first have knowledge of facts from which it would be a fair inference that Hans had some authority from the German Corporation.

Mr. Ingraham: Isn't some kind of authority essential to authorize a man here to—

The Court: That would depend on how much Hans did.

Mr. Ingraham: Your Honor would hold that a ratification by the German Company of one particular transaction would be authority for the agent here to make future transactions?

The Court: It would depend on what they show. If they showed that there was a course of dealings in which he represented the German Company, I would probably hold he had authority to represent that Company. I cannot tell anything about what the proper inference would be until I hear what Hans did. What you are trying to do now is to prevent the statement of those facts.

Mr. Bradley: The question does not call for such facts.

The Court: I would rather deal with the whole thing now, so that we will know what the scope of his authority is. I
209 shall allow this witness to say if he knows at first hand of actual transactions between Hans and the German corporation

and if he knows who acted for them, if Hans acted for them, let him describe what those transactions were with the idea that they may be able to show what Hans had authority to do. It does not at all follow from that what I will rule as to what he did have authority to do.

Mr. Quinn: The records of the Botany, so far as the officers now in charge have advised me, demonstrate that the communications between the Leipzig corporation and the Botany were by letter and cables in every case, even after the period when the stock was in the name of the two Stoehrs in America as Trustees. Dividends were credited upon their direction, paid out directly upon their orders and the letters that we will put in evidence will show that that Company managed their own affairs themselves and that Hans Stoehr was never directed, as far as the Botany Mills can show, to represent the German firm.

210 Mr. Vorhaus: I was going to ask him first what position, if any, Hans had.

The Court: No, we will have to take it up in this way. His acquaintance with Hans, who is his brother, his business dealings with him may be such as to justify an inference of Hans' authority. Did you ask him what authority Hans had.

Mr. Vorhaus: No.

The Court: Well, strictly, if they are going to try it by the book, it calls for his acquaintance necessarily second-hand, or at least his inference from what Hans actually did. The only way you can do it which will be strictly proper, will be to find out what transactions Hans conducted; that from his transactions had with the Kammgarn-Spinnerei that he knows about it, and who acted for them and so on. It will be rather a cumbersome way of proving it, but if they cannot agree with you regarding it.

Mr. Vorhaus: I will take your Honor's suggestion, but I want to say this, that so far as proving the position or office that Hans had in the German Company, my impression is that this witness knows from the statements of his brother and his father, and, in fact, he had been there sometime himself, he knows that Hans was held out to be a director and a certain officer of that company, by the principal officers there, and I think I may ask him; that is why I asked him the question, as to what knowledge he has upon the subject as to what position Hans had.

The Court: Of course, what they said to him would not be good, but the fact that they were holding out to him would be different, if it is conceded that they were directors. I do not know that that even is admitted here. I do not know that they are willing
211 to admit what relation to the German corporation Eduard and Georg had; you might find out.

Mr. Vorhaus: Here is a corporation which was a family affair, and it is fair to assume—

Mr. Quinn: It is not a family affair at all. He just admitted the family were the minority owners, Mr. Vorhaus himself.

The Court: I think you will probably have to go along in the

way I stated, because your questions will inevitably involve second-hand information.

The Witness (resuming): I was in Germany in the year 1914. I was at the offices of the Kammgarn-Spinnerei Stoechr Company, of which Company I was also a stockholder, but I never attended any of the Directors' meetings.

In response to a question "who was the President of the Kammgarn-Spinnerei in 1914," the witness stated that the German Aktiengesellschaft differs from the American corporation in this—that the Aktiengesellschaft has an acting Director, a manager. He is the director. He has the German name 'Director.' He is a director and he signs the form. Stoechr & Company had two of those; one my brother Georg and one Dr. Kuntze. Above these two directors is an aufseherrat—or executive committee may be the proper expression for it here. This aufseherrat has a chairman, who at that time, I think was my father. He had that position for very many years. I do not know whether he resigned in 1914 or 1915 or in 1916, but he is not holding it now at present.

Mr. Bradley: We object to the last answer because it does not appear to be within the knowledge of this witness.

212 The Court: Objection sustained. I will strike that out.

The Witness (resuming): Hans was a member of the Aufsichtsrat—the exact definition of the Aufsichtsrat is that it is the supervising board. Hans went to Europe practically every year just as I did. He would spend one or three months over there.

In response to a question "Will you tell me some of the transactions that were had between yourself or the Botany Worsted Mills and the Kammgarn-Spinnerei in which Hans participated?" the witness replied "At present I know of no transaction which would follow Hans or Stoechr & Company into Botany, for they were absolutely separate companies; he voted their stock at their stockholders' meetings.

The Court: I will take that, that he voted the stock of the German corporation at the directors' meetings of the Botany Worsted Mills.

The Witness: The stockholders' meetings.

Mr. Bradley: Will your Honor in that connection get the years?

The Court: Yes.

213 The Witness (resuming): He voted the stock in 1913, 1914 and 1915, I think the stock was already transferred to him and me as trustees; I would not say that definitely.

Replying to a question regarding what acts he knew of that Hans undertook, the witness said "May I amend my statement here? When Mr. Eduard Stoechr was over here, he was chairman of the company, as far as I remember, he voted that stock." I cannot say the years; I do not remember the years, but it was a rule that when my father was over here he represented the firm, and when he was not here at the stockholders' meeting, that my brother represented the firm. By the term "firm" I mean the German Company.

In 1914 the Kammgarn-Spinnerei Stöhr Company sold worsted yarns over here, which were supervised by Hans Stöhr. The Botany Worsted Mills had charge of those sales; Hans Stöhr negotiated them to the Botany Worsted Mills. He effectuated the sales. The Kammgarn-Spinnerei Stöhr & Company offered yarns, or Botany Worsted Mills wrote over and asked for delivery of yarns, or asked for offers—that was considered a sale to the Botany Worsted Mills, and all these affairs were directed by Hans E. Stöhr. Mr. Stöhr signed the letters and he did all that was necessary in the form of negotiations. Hans acted for Botany and wrote the Kammgarn-Spinnerei; he signed the letter on behalf of the Botany Worsted Mills and the Kammgarn-Spinnerei wrote back to Hans. I do not recall any other acts or any transactions between the Kammgarn-Spinnerei Stöhr Company and the Botany Company or any other concern; the Kammgarn-Spinnerei did no business over here until 1914, and then only for a very short time, until the European war stopped that business.

There were no business transactions had in this country in which the Kammgarn-Spinnerei was interested until 1914 that I recall; everything was stopped August 1st, 1914. As far as I remember during the first seven months of 1914 the Kammgarn-Spinnerei shipped yarns over here; that is the transaction I spoke of. They sold some yarns to the Botany Mills or some other customers, my brother Hans writing for the Botany Worsted Mills to the Kammgarn-Spinnerei, and they answered him. My brother Hans was representing at that time, as I said before, the Botany Mills, and the German house was being represented by either my brother Georg or my father over there. In respect to the other customers to whom the Kammgarn-Spinnerei sold worsted, I cannot recall separate instances, and I think that the financing of those transactions were done through the Botany Worsted Mills. That means that the customers would make payments to the Botany Worsted Mills, instead of Kammgarn-Spinnerei, Stöhr & Company. I do not think the transactions were done directly between Leipzig and the customers here; for the most part through the Botany Worsted Mills, the Botany Mills for the most part acting as selling agent.

Hans Stöhr being the particular officer of Botany Worsted Mills conducting those negotiations.

Mr. Vorhaus: I take it the Court will take judicial notice of the date when war with Germany was declared, April 6, 1917.

The Court: Yes.

Mr. Vorhaus: And that war against Austria was declared December 7, 1917?

The Court: Yes.

Mr. Quinn: Your Honor takes judicial notice that diplomatic relations were broken off February 3, 1917?

The Court: Whatever you tell me.

Mr. Vorhaus: If your Honor please, there is one fact that was acquiesced in this morning, which is not quite correct, and that is that between the time of the breaking of diplomatic relations and the

outbreak of the war, that there was no communication between citizens of America and citizens of Germany.

Mr. Ingraham: We never agreed to that.

The Court: They asserted that there was.

Mr. Quinn: I said we would prove there was communication right up to the outbreak of the war.

The Court: Mr. Quinn's position is that it was possible to communicate with Germany until April 6th.

Mr. Vorhaus: Your Honor made the observation that between the date of these transfers and the outbreak of the war there could have been communication, and they could have heard of it, and Mr. Bradley made the suggestion that there was no communication—

Mr. Bradley: There certainly was no communication after April 6th.

Mr. Vorhaus: No, before April 6th.

Mr. Marshall: I do not think there was any misunderstanding.

The Court: I understood it just as Mr. Bradley gave it and as Mr. Quinn stated it.

Mr. Quinn: Mr. Bradley said what he did, that it would not be legal after April 6th.

The Witness (resuming): We consulted counsel in all of these transactions involving the incorporation of Stoehr & Company, Incorporated, and the making of this contract for the 14,900 shares, our counsel being Herbert Heyn of Heyn & Covington, a New York law firm. Mr. Heyn died April 30th, 1918. The firm of Davies, Auerbach & Cornell were not at any time in these matters associated with the firm of Heyn & Covington. Mr. Lunsen went with Mr. Heyn to Washington in 1918 to explain the reports to the Alien Property Custodian which the Botany and Stoehr and Sons had made. I think that on March 20th a directors' meeting of Stoehr & Sons was held. The minute book will show that,—at which meeting Mr. Heyn was present.

By Mr. Vorhaus:

Q. Just state what Mr. Heyn stated in regard to the resignations that were demanded by Mr. Palmer?

217 Mr. Ingraham: There is no proof that any were demanded.

The Court: I will take it, only I will say this, that unless it is proven that what Mr. Heyn reported to them in fact emanated from the Alien Property Custodian I shall not regard it.

They will have to prove two things. First, that the Alien Property Custodian made the request, and second, that they acted on it. Now then, this is the second proof first, a little out of order. I will take it now.

Mr. Quinn: I do not know whether it is quite clear; I do not know whether counsel for plaintiff has made it clear which company they are referring to, Botany or Stoehr.

Mr. Vorhaus: I am talking about Stoehr and Sons.

Mr. Quinn: Now then, I have the record of that here, and that was not done at a stockholders' meeting at all in the first instance. It was done by successive resignations later on. If you want the record.

The Court: I will take what Mr. Heyn said that he had been told by Mr. Palmer.

218 The Witness (resuming): This was at a Directors' meeting of Stoeck & Sons, Incorporated. Mr. Heyn returned from Washington, called that meeting, and, as far as I remember, there was present George B. Roehlig, Alfred de Liagre and myself, besides Mr. Heyn. Three of the above were directors. The presidency of Stoeck & Sons at the time was waiting through the death of Hans E. Stoeck. Mr. Heyn said in substance that Mr. Palmer desired us to elect in place of the deceased, Hans E. Stoeck, Mr. James N. Wallace as president; he wanted further to elect in place of Mr. de Liagre and Mr. Roehlig. I do not know in which order, Mr. Francis P. Garvan and Mr. Duvall. He wanted all the directors to resign and selected the two directors aforementioned, Mr. Garvan and Mr. Duvall; I do not know whether at that time I resigned and was re-elected, or whether I just stayed in the firm. I suggested at the time to Mr. Heyn, asking him what would happen in case we would not comply with the wishes of Mr. Palmer. He said that Mr. Palmer was an officer of the State, elected Alien Property Custodian, and if we would not comply with his wishes, the Company would be seized by the Government, it would be taken over by the Government forcibly. I cannot state whether he told me that that is what Mr. Palmer said or that that is what he thought would happen; the meaning of what Mr. Heyn said Mr. Palmer had said was that he had got that impression at the Alien Property Custodian's office at Washington.

219 I would also not say that Mr. Palmer said that personally to him, but that is what he brought back from Washington, from his dealings with the Alien Property Custodian's office. I was not present when he talked with Mr. Palmer. Thereupon, we elected Mr. Wallace as president; and elected Mr. Francis P. Garvan and Mr. Duvall as directors. Mr. George Roehlig and Mr. Alfred de Liagre resigned. Mr. Wallace was elected President and director in place of Mr. Hans E. Stoeck, who had died two days before, so there were three out of four directors and I was the only remaining director. I remained a director I think to the 14th of October, 1918, but I would not say that that date is correct, but approximately the beginning or the middle of October. In the same meeting that Mr. Heyn said what we just talked about, he also requested me to hand in my blank resignation, and that this resignation was acted upon in the meeting in the beginning of October, where I was not present, of which I had never received notice as a director that the meeting would be held. I was requested at that time on March 20th to give my resignation in blank, so that this blank resignation could be accepted at any time the other directors chose.

220 The Court: As far as we have gotten yet, that may be the fact, but as far as we have gotten yet, Mr. Heyn suggested that two directors resign, and the places were to be filled by Mr. Palmer's nominees. Now, the matter of the resignation of Mr. Stoehr, he has not said anything about Heyn saying that came from Palmer.

The Witness (resuming): I was told on March 20th to give in my resignation in blank by Mr. Heyn, that it was at Mr. Palmer's request; otherwise I would not have been re-elected a director. I cannot state whether Mr. Heyn brought it back from Washington, whether Mr. Palmer told it to him, or anybody else, I cannot say. I do not say that Mr. Heyn gathered this from Mr. Palmer personally but from Mr. Palmer's office, from his dealings with the Alien Property Custodian's office. I do not know whether he saw Mr. Palmer personally, or who he saw. Mr. Heyn was to my knowledge in Washington six days or something like that, and while he saw Mr. Palmer personally during that time, I think his dealings were with Mr. Duvali and Judge Brodhead. He did not say that Palmer did it, but that he got it from either Mr. Palmer or Mr. Duvall. Mr. Duvall was one of the attorneys.

221 Mr. Vorhaus: Is Judge Brodhead here in Court?

Mr. Bradley: Yes.

Mr. Vorhaus: What position did Mr. Duvall hold?

Mr. Brodhead: He was Chairman of the Division of Corporations.

Mr. Vorhaus: In the Alien Property Custodian's Office?

Mr. Brodhead: Yes.

The Witness (resuming): I do not know who was subsequently elected as director in my place in Stoehr & Company, Incorporated. I had a conversation with Mr. Heyn in reference to the Botany Worsted Mills with respect to the officers resigning there, I think, it was after this very meeting, but I would not be sure about the date, for during that time I had been almost daily in conference with Mr. Heyn. About that time he said in substance about the same thing as with Stoehr & Sons.

Mr. Vorhaus:

Q. Tell me what he said.

Mr. Ingraham: Your Honor takes this under the same ruling?

The Court: Yes. I suppose Heyn was the agent, and whatever was said to Heyn is enough. That was the demand upon their agent, but I do not know that it makes any difference. If he will say what the agent told him.

222 Mr. Ingraham: He was their own agent and their own attorney who advised him.

Mr. Vorhaus: Mr. Heyn is dead, and he negotiated between the Alien Property Custodian's office and this Corporation.

The Witness (resuming): I cannot exactly state any more what Mr. Heyn said, but in substance it was this, that we had to elect seven

directors out of eleven for Botany Worsted Mills, seven out of eleven being the nominees of Mr. Palmer, and four directors would be left to select from the Botany Board. There thus arose an argument in several meetings about the directorship of the appointees of the Botany in the stockholders' meeting. Then I was told by Mr. Duvall to vote for seven directors who were nominees of Mr. Palmer, that I think was at the regular stockholders' meeting, and the four for Botany Worsted Mills were left open. I voted the stock—I think there was no power yet, no directors' meeting, as far as I remember, which empowered any one particularly to sign a proxy for Stoehr & Sons, and I think there was an old power of attorney which read to my name; I think that was the reason I voted the stock. The names of the seven directors that were to be elected at that meeting, if I remember right, came in a letter from the Alien Property Custodian's office; whether I got that directly from Mr. Duvall, or whether it was sent, I do not know; the names of the seven directors are on the Bill of Complaint. They are James N. Wallace, Andrew B. Duvall, Walter D. Jones, Thomas P. Martin, Thomas J. Maloney; Herbert B. Howell was added later, H. C. McEldowney; Richard Stockton and W. J. Hellmer were added later. We submitted the four names that we wanted to have elected, and as the Alien Property

223 Custodian was represented with two attorneys on his part of the Board, by Mr. Duvall and Mr. Francis P. Garvan, we suggested that the old Botany Board or the German Board, as Mr. Quinn said before, should have at least one attorney on them,

We voted on and elected all of these seven directors whose names were given us by Mr. Heyn as the nominees of the Alien
224 Property Custodian. None of them had ever been stockholders in our company,—I would like to correct that statement. There was a demand made upon Stoehr & Sons at the time to transfer to each of those gentlemen five shares of stock which were in the possession of Stoehr & Sons to qualify them as directors and I do not know whether that was done before their election or after their election; that was requested by the Alien Property Custodian's office but before that request was made, none of these seven gentlemen were stockholders of my company or of the Botany Worsted Mills and none of them were stockholders at the time of their election or prior thereto.

Whereupon, Mr. Vorhaus, as counsel for the plaintiff, called upon the defendants to produce the first letter that Mr. Palmer wrote to the Botany Worsted Mills demanding the possession of the stock. Mr. Quinn, as counsel for the defendants, denied all knowledge of such document, whereupon Mr. Marshall of Counsel for the plaintiff, for the purpose of showing the seizure of these 14,900 shares of stock of the Botany Worsted Mills offered in evidence the direction, order and demand of Mr. Palmer, purporting to bear
225 the date of April 5th, 1918, addressed to Botany Worsted Mills, without admitting the validity of such document and claiming that the sending of this demand was an unlawful act. Such document was then admitted in evidence and marked Exhibit 9.

The Witness (resuming): The directors other than the seven nominated by Mr. Palmer and elected were Mr. Prehn, Mr. Ferdinand Kuhn, George Roehlig and myself and at the time we were so elected directors we were all requested to hand in our resignations in blank form, as in the case of Stoehr & Sons. I cannot say to-day who really made the demand, as far as I remember, either Mr. Quinn or someone from his office made the demand. All the books at that time were kept at the office of Mr. Quinn—I mean the books and papers. I was present in the meeting of the Board of Directors. If I am right in the date it was October 10th or October 11th, of 1918, when the meeting was opened, and just that minute I entered the door. I was not at the opening of the meeting; I just heard the last few words, and Mr. Duvall, the Chairman, said that before the meeting is the resignation of Mr. Max Stoehr. I had not given any additional resignation except this blank one and this was acted upon in October, 1918 and unanimously accepted. I do not know who was elected in my place. Up to the time that my resignation was accepted I think I attended the Directors' meetings. There was an executive committee, and they met either before or after the meeting as a rule but neither I nor the other old members of the Board were invited to take part in those meetings. The meeting of the directors was sometimes called for 10.30 but did not take
 226 place until 11.30, 12.30 or 1.30, on account of an executive meeting which was in session. I cannot exactly say who constituted the executive committee; that would be in the records of the Botany, of the minute book of the Botany, who constituted it but neither I nor any of the other three were members of that executive committee.

By Mr. Vorhaus:

Q. So far as conducting the management and the policy, and the place, were any resolutions introduced by any of those seven directors nominated by Mr. Palmer.

The Court: Of course; they had the majority.

By Mr. Vorhaus:

Q. At the time when the Botany Worsted Mills was taken possession of by the election of these new directors, was the Botany Worsted Mills solvent?

A. It was.

227 I have already described the nature of the business carried on by the Botany Worsted Mills. Stoehr & Sons, Inc., at the time that corporation was taken possession of by the election of the new Directors was, to my knowledge, solvent.

Stoehr & Company had assets of over \$1,000,000 but as to the liabilities I cannot say; the balance sheet will prove that. The assets consisted, besides the 5600 shares of stock, of open accounts and merchandise, raw wool and also this contract for the purpose of the 14,900 shares. Neither the property of the Botany Worsted Mills or

Stoehr & Sons, Incorporated, at the time that the Government took possession, was perishable, or such as required immediate sale for its preservation. The stock of the Botany Worsted Mills has never been listed on any exchange nor was it ever traded in the open market; there was no market for the stock if offered publicly nor would there be an immediate acceptance of it. The stock of Stoehr & Sons was not listed on the Stock Exchange nor was there any market for that stock.

228 Whereupon, Mr. Vorhaus, as counsel for the plaintiff, offered in evidence the notice issued by the Alien Property Custodian advertising the proposed sale of the 24,410 shares of the Botany Worsted Mills and the Court accepted it remarking "It is an official act of sale; I will take it as such. It goes in against everybody". It was then marked Plaintiff's Exhibit 10.

It was conceded by Counsel for the defendants that similar advertisements were inserted in many newspapers in the United States.

The Witness (resuming): There is no plant in the United States that is in one compact plant as the Botany is, that they produce from raw wool, that they get the raw wool and distribute out of the same mill the finished material; it is as a single unit or plant the largest of its kind, as far as I know, in the United States.

Our competitors chiefly are Forstman and Hoffmann, in some products the American Woolen Company, and in part of our products, in yarns, there are quite a number of concerns which are in competition with us, and in dress goods there are a number in competition with us, but there are very few who do both, who sell yarns and dress goods, and men's wear at the same time. I think Forstman & Hoffmann combines the whole thing together, but they have two mills; and so does the American Woolen Company. It is very hard to say what other concerns there are besides the two above mentioned but I could pick them out of the Textile Bluebook, but I could not know offhand. Some of these people who deal in or make yarns are very large concerns; I could not say how many there are, but that is only a part of our business. There are, of course, in Eng-

land and France quite large concerns, and there are concerns
229 in France with which we have been very friendly before, and who have invested in mills in France, and the same products as we make, not in one plant, but in separate plants, in combing plants and spinning plants and in weaving plants, but both in England and France and in Belgium there are plants similar to ours which manufacture cloth, gather the wool and do all that kind of work. The plant of Juillard & Company, for instance, are heavy competitors of ours in light weight dress goods fabrics; I cannot say which plants they control. They manufacture and import, and I do not know how far they import and how far they manufacture here. It is an American house, but it is of French origin and French controlled, so far as I know; the firm of Juillard & Company is, as far as I know, originated in Rubaix, as far as I know. I would not swear to it, but that can be very easily ascertained.

Mr. Quinn: I move to strike out so far as he knows.

The Court: Yes, do not go into that. Juilliard & Company are an old American house; they have been citizens for a hundred years at least.

The Witness (resuming): I married in this country; my wife and daughter were both born in this country.

Whereupon, Mr. Vorhaus, as counsel for the plaintiff, called the attention of the Court to paragraph 17 of the Bill, setting forth the various treaties the United States had, of which the Court took due cognizance.

Whereupon, Mr. Vorhaus, as counsel for the plaintiff, 230 offered in evidence Exhibit 2 annexed to the bill and it was consented by both sides that the copy annexed to the bill may be received in lieu of the original. The date of its service was conceded by both parties and that about the date of its date it was served upon the Alien Property Custodian and retained by him.

Whereupon, Mr. Vorhaus, as counsel for the plaintiff, offered in evidence the Notice of Claim under oath under Section 9, of the Trading with the Enemy Act, which is Exhibit 3, attached to the bill. This was accepted with the same stipulation as contained in the preceding paragraph.

Whereupon, Mr. Vorhaus, as counsel for the plaintiff, further offered in evidence the notice of claim pursuant to Section 9 of the Trading with the Enemy Act, which is annexed to the supplemental bill and which is referred to as Exhibit L, attached to the supplemental bill. This was received with the same stipulation.

The Court: These three exhibits need not be marked. They are part of the record, they are part of the case.

Whereupon Mr. Vorhaus, as counsel for the plaintiff, asked the defendants' counsel to furnish him with the names of the executive committee. Mr. Quinn, as counsel for the defendants, then reading from the minute book of the Botany Worsted Mills, stated that the executive committee was appointed at a meeting of August 20th, 1918, and that Messrs. Wallace, Maloney, Jones, Martin and Duvall were the members of the executive committee elected at the meeting of the Board held August 20, 1918. They continued in office until March 27th, 1919, when the following members were elected: Messrs. Maloney, Howell, Jones, Martin and Duvall, and are now members.

Whereupon, Mr. Vorhaus, as counsel for the plaintiff, offered in evidence the financial statement of 1917 of the Botany, as of November 30, 1917. This was marked plaintiff's Exhibit 11. Also a 231 partial statement of 1918 as of November 30, 1918, which had been uncompleted. This was marked plaintiff's Exhibit 12.

By Mr. Marshall:

Q. Did you have any notice of any proceeding taken by the Alien Property Custodian with regard to the seizure or shares of stock of

these 14,900 shares of stock, and the shares of stock claimed by Stoehr & Sons?

A. There may have been a notice given to the company of the forfeiture or seizure of the 14,900 shares of stock and the shares of stock claimed by Stoehr & Sons, but I personally have not seen any. I know of no notice nor did I ever hear of any to the company. I did not appear before any Court in respect to this matter or any tribunal nor did my Company, as far as I know; there was no proceeding before any Court with regard to the seizure of these shares of stock to my knowledge as long as I was a director of the company, nor did I ever hear of any.

Whereupon, Mr. Vorhaus, as counsel for the plaintiff, offered in evidence a statement prepared by Mr. Hesse, the Treasurer of Stoehr & Sons, of the assets, the current assets and current liabilities of the Company as per the books. This was marked plaintiff's Exhibit 13.

Mr. Bradley then cross-examined the witness:

232 The Witness (resuming): I came to America in 1900.

The first venture of my father into the woolen yarns and spinning was I think Eichel & Company; my father was director of Kammgarn-Spinnerei. The firm in Leipzig was founded approximately in about 1880 and the one in America in about 1889. There was a firm of Stoehr & Sons in Leipzig was a partnership and there was a corporation known as Kammgarn-Spinnerei there too. They did business and had bank accounts both in Leipzig and Berlin. Stoehr & Sons is the same concern that did business here; one partner was over there and one was over here and had assets both in Germany and America. It was a single concern. My last visit to Germany, as I stated before, was in 1914. At that time the Kammgarn-Spinnerei had five members the Aufsichsrat, which corresponds to an executive committee on the American side. The five members were my father, my brother Hans, Mr. Beckman, Paul Gulden and Rosenthal; this was in 1914. My brother Georg was not a member of that concern, he is a director. There were two directors, Georg and Dr. Kuntze. The aufsichsrat is changed over a certain length of time; I do not exactly know how those regulations are. I was not an officer myself. I am a stockholder in the Kammgarn Spinnerei whose capital was 12,000,000 marks. I was the holder of 600,000 marks. My brother Hans was also a stockholder, as far as I know, possessing over 1,000,000 marks. My father, of course, was a stockholder, I think a very large stockholder but I do not know to what extent, larger, however, than either Hans or myself, as far as I know. My brother Georg was also a stockholder. The stock of Stoehr & Company is on the Exchange in Leipzig and Berlin.

233 The Kammgarn-Spinnerei is on the Exchange of Leipzig and Berlin, and it is daily traded. There were a large number of other stockholders and I suppose the directors and executive committee were all stockholders. Besides my interest in the Kammgarn-Spinnerei I had stocks of Solbert & Soehne, a spinning concern, which afterwards were exchanged into stocks of the Kammgarn-

Spinnerei Stoechr & Company, by reason of which I received some additional shares which is included in the 600,000; besides I had bonds of the Kammgarn-Spinnerei, something like the gold bonds which are over here amounting to a thousand marks which is my total bond holdings. I do not recall any other property that I had in Germany besides that; I might have had some more in my bank deposits; I do not know exactly what I have in my bank deposits now; I have not looked that over. The shares I own are deposited with the Deutsche Bank. I returned from Germany in November, 1914. My brother Hans was not there at the time; he was there in the Spring of 1914. Shortly after he returned I went over and he did not go over again after I was there. My brother Georg made one visit over here, arriving in 1914 and leaving in 1915. I have not the date of his arrival and departure. Approximately, he arrived before Christmas and I saw him the last time, I think it was in the middle of October, in New York in 1915 remaining here approximately ten or eleven months. My entire family was actively connected either with the Kammgarn-Spinnerei or the Botany as well as interested in Stoechr & Sons, the partnership. I have no statement of the German assets of Stoechr & Sons. Georg Roehlig was my first cousin. He is the only son of my father's only
234 sister. He is then the nephew of my father. He had therefore not been associated with Stoechr & Sons' business but up to that time and prior to that he had been associated with Botany, I cannot exactly state how long. I think Mr. Roehlig came over here in 1890 or 1891 and since that time has almost continuously been with Botany with the exception of a period of study which he went over to Europe to complete his studies for the Botany Worsted Mills. He died when he was 45, being a naturalized citizen; he died in October, 1918. Upon the organization of Stoechr & Sons, Incorporated, he retained his connection with Botany but he was not active, he simply assisted me and my brother Hans in perfecting the organization; took the nominal office of Vice President, the business of Stoechr & Sons was very little active anyway. I mean, it was not a large officer, or something like that. De Liagre was connected with Botany since a long time. His uncle, I think, was for many years in the aufsehstrat of Stoechr & Company, the Kammgarn Spinnerei in Leipzig, and his family was connected with the Stoechr interests. He had been connected with the Botany prior to the incorporation of Stoechr & Sons, Incorporated, and that connection continued afterwards; he did not become actively associated with Stoechr & Sons, Incorporated, when it was organized. He is an American citizen. The organization of Stoechr & Sons, Incorporated was completed, I think, on the 19th of February and this contract under which I claim by this suit is dated on the 20th of February. I attended a meeting of the directors of Stoechr & Sons, Incorporated on February 20th, the day after the organization of that concern, at which the entering into of this contract was considered and authorized; I think I acted as Secretary in that meeting. I
235 know that the Signatures to the articles of co-partnership of the members of the firm of Stoechr & Sons are genuine. (Ex-

amines the articles of copartnership.) I state that these are the articles of partnership that govern the interests of the several partners and the activities of the firm and I call your attention that there are only three signatures on the original. I think the Articles were signed in different places; I am not quite sure. I think I signed it in Passaic, New Jersey. I cannot state where the others signed it; I am quite sure, though, they may all have signed it in Passaic. I noticed the initials on the first blank line. I cannot say whose writing it is; it is not my father's. I am not sure whether there are other copies of this but I think I have a copy, an unsigned copy of it in my files. These were articles that controlled and governed the partnership, as far as they did control it; they were the only articles we had. The partnership was a very loose one. It was an absolute family affair, and we found that this instrument was binding us in very many things too far after a very short time, and then we were not governed by it any more; neither my father nor my brother Hans was. We conducted it as a family affair and the more active partner was on this side, my father being on the other side. My brother Georg and myself were silent or passive partners.

Mr. Bradley: I offer that in evidence.

Marked defendants' Exhibit A.

The Witness (resuming): 'Now as to the Agreement (examining) as it appears in the minute book, with the name Kammergaru-Spinnerei Stoechr & Company, Aktiengesellschaft; it purports to be signed by Hans E. Stoechr, but this is not the signature of my brother; this is not the original; it is a copy you can see that all the signatures are in one handwriting.

Whereupon, Mr. Bradley, of counsel for the defendants, handed the witness another paper.

The Witness (resuming): This is the original (examining); this is the signature of Hans E. Stoechr, that is Mr. Roehlig's signature and that is my signature; this is Mr. Zimmermann's. All those ink signatures are all genuine. I know my brother's signature and that is his signature. I know Mr. Roehlig's signature and that is his signature. I know Mr. Zimmermann's signature. I identify my own signature. They are all genuine. The paper, as stated therein, was signed in Passaic; it was signed on the day when the agreement was made. I do not remember exactly where we were when the agreement was signed, but I am perfectly sure that we were in the place where we signed it. It was signed right there where it was made. I think it was during a meeting of the directors when it was signed, if I remember correctly, at Passaic; that meeting was attended by my brother Hans, myself, Mr. Roehlig and Mr. De Liagre. I think Mr. Heyn was present at the meeting. I think Mr. Heyn had been the regular counsel of Stoechr & Sons, the partnership, practically since it originated, which I believe was in 1913; I cannot state exactly, but I do not think Stoechr & Sons ever had another counsel before Mr. Heyn; I think, in fact, that Mr. Heyn has just drawn

that agreement which you just showed me a little while ago, that co-partnership agreement. I do not exactly know since when Mr. Heyn became counsel for the Botany—I think that through meeting him in Stoehr & Sons, he became counsel for Botany; he had been counsel for the Botany for some time prior to this. There was no other attorney present then Mr. Heyn. There was no other attorney consulted than Mr. Heyn or concerned in the contract for the sale of this stock. There was no other counsel consulted about the contract for the sale of this stock; the only parties who
237 participated in that transaction were my brother Hans, George, Roehlig, de Liagre, myself and Mr. Heyn. The matter of changing directors occurred in March, 1918 in Stoehr & Sons and I think on March 20th in Botany, or the minute book will show the date. That was the first change that was made at least as far as the Alien Property Custodian had any connection with it after this agreement of February 20th, 1917. Mr. Heyn went to Washington, as far as I know and his visit was I think in February; he went down at the instance of the Board of Directors of Stoehr & Sons and the Botany, representing both concerns, as far as I remember with reference to the Alien Enemy ownership of the stock and any other interests in either or both concerns. He went to explain the whole thing. We made a report. After that report, Mr. Heyn went to Washington; I do not know what was instigating Mr. Heyn to go down there just at that time. I do not remember that I have seen correspondence, or that he was asked, but I know he went down for that reason to explain those reports to the Alien Property Custodian; this was prior to anything said or done in reference to changing the personnel of the directors of either concern.

Cross-examination.

By Mr. Quinn:

The Witness (resuming): In regard to my resignation as a director of Stoehr & Sons, Inc. which was acted upon at a meeting of the Board at which I was not present. There was a notice sent to me which arrived too late, and, as I remember, after correspondence, I found out that that very meeting was adjourned to which I was invited too late, and of that adjournment I was not notified, and I protested at the time to Mr. Wallace about that action of the Board.

238 Mr. Quinn: I move to strike that out as not responsive and on the ground that the letters speak for themselves.

The Court: Yes, the letters will have to speak, but I will have to take it that he got notice too late.

Mr. Marshall: And that he had no notice of the adjourned meeting.

Mr. Quinn, as counsel for the defendants, then handed a letter to the witness, dated October 21st, 1918, addressed to James N. Wallace and asked him to identify his signature to that letter, which the witness did identify as his signature. The letter was then offered in evidence and marked defendants' Exhibit B.

The Witness (resuming): If I remember right, the invitation to the last meeting of the Board of Directors which was called for 2.30 reached me with the evening mail; that was about five or six o'clock. It was sent too late to reach me.

By Mr. Quinn: You do not mean to imply you did not receive due notice in accordance with the by-laws do you?

A. I do not know; I did not receive the notice in time. I do not know when the notice was mailed to me.

When asked by Mr. Quinn, as counsel for the defendants, whether he had the original or a copy of a letter dated October 22nd, 1918, sent by Mr. Quinn the witness replied that he did not know, he would have to look it up.

By Mr. Quinn: Do you deny that you received that letter?

A. No I do not.

Q. Is it your best recollection that you received the original of which that is a carbon copy?

A. I probably received it.

Q. Would you be willing to state provisionally subject to correction, when you look it up, that you probably received the original of which that is a carbon copy?

A. I am.

A copy of said letter was offered in evidence and accepted by the Court, subject to its verification by the witness of his having received it, and was marked defendants' Exhibit C.

Mr. Quinn, of counsel for the defendants, then showed the
239 witness a letter addressed to John Quinn and asked him if the signature thereon was his signature. The witness responded that it was and that he had sent it, whereupon the letter was offered in evidence and marked defendants' Exhibit D.

The witness was then shown a copy of a letter dated October 22nd, sent by Mr. Quinn to him, enclosing a copy of the minutes of Stoehr & Sons, Inc., of October 14, 1918, and he stated that he had no doubt but that the enclosure was such a copy.

Whereupon, Mr. Quinn, as counsel for the defendants, read into the Record the minutes of a meeting of the Directors of Stoehr & Sons, Inc., of October 14th:

"Minutes of a regular meeting of the Board of Directors of Stoehr & Sons, Inc., held at the office of the Central Union Trust Company, 54 Wall Street, Manhattan, New York City, Monday, October 14, 1918 at 2.30 o'clock in the afternoon.

Present: Mr. James N. Wallace.

There being no quorum, Mr. Wallace adjourned the meeting to Wednesday, October 16, 1918, at 1.45 p. m.

(Sgd.)

THOMAS J. CURTIN,

Secretary."

He then read into the Record the minutes of a meeting of said Directors held on October 16th, at which all the Directors were pres-

ent except Mr. Stocher. The resignation of Mr. Stocher as Director of the Company was considered and unanimously accepted. Mr. Paul Kieffer was nominated and elected Director in place of Max W. Stocher. Mr. Justus Sheffield was nominated and elected Secretary of the Company instead of Mr. Stocher.

The Witness (resuming): As far as I know, my father, Eduard Stocher, acted under the provisions of the partnership agreement of May 1st, 1913, and I supposed he knew of its terms and provisions. He became a member of the firm. I do not recall that there is any copy of the articles signed by him; I do not remember whether he was here at the time. As far as I know, subsequent to the formation of the partnership, he transferred property to the partnership, pursuant to the terms of the articles of co-partnership; I think he did transfer a large block of stock of the Botany Worsted Mills that formerly stood in his name into the name of the partnership.

240 The stock books of Botany Worsted Mills will show that.

By Mr. Quinn: The articles of co-partnership, Article 4, define active and silent partners, and then contain the following provision:

"The active partners shall have the right to conduct the business in such manner as they may think best, except that no transaction involving a value of more than \$25,000 shall be consummated without the written consent of all the partners."

Q. Will you please tell the Court whether there was any written consent from your father, Eduard Stocher, or your brother Georg Stocher, to the assigning by the partnership or attempted assignment by the partnership, of all the assets of the partnership of Stocher & Sons, Incorporated, in February, 1917?

A. Not that I know of. I was the holder approximately of 600,000 marks in the Kammgarn-Spinnerei; I do not know exactly whether that is right; I do not know the amount of my brother's holdings in the end of 1915 or 1916; my brother was here in 1915 but I did not speak to him about his affairs nor about his ownership in the Kammgarn Spinnerei, as far as I recall; I do not think that I was vitally interested to ask him for the simple reason that we all were trying to acquire more stock. My brother was here nearly a year but I have no sufficient recollection to testify under oath that I spoke to him about his interests in the Leipzig corporation as a stockholder. My last knowledge of my brother, Georg's holdings in the Leipzig corporation was approximately between one and a half and two million; my brother, Hans' stockholdings in the

241 Leipzig corporation was, as far as I know, a little over one million marks; I cannot say what my father's holdings were, not even approximately,—my father never told us really what stock he held in Leipzig. I know that my father held stock in the names of banks, which were standing in the names of banks. My father is 74 years old now and in 1915 he was chairman of the *aufsichtsrat* of the Kammgarn-Spinnerei, or executive committee. The construction of the German company is entirely different from the American

fashion. There is a director, and he has a so-called "procuristen" to manage the business. This "procuristen" here would be a director, and I really do not know how many there were in Leipzig. I do not know how many people had "procuristen" for the Kammgarn-Spinnerei in 1915, 1916 or 1917, for these people have no voting power; they are only managers of the business. The executive is the managing director. George Stoeck and Dr. Kuntze were the two executives of the Company in 1916, the only two who could sign the company alone or separately; of the "procuristen," two can sign together. When the Company was dealing with banks or passing titles to the property, the signatures of either of the managing directors alone would be accepted, but that when we were dealing with the procuristen, and when the company had to sign a document binding the company or transferring title, and the procuristen signed it, there had to be two of them, but as the procuristen changes from time to time their signatures had to be identified like bank signatures and they had to be stated officially as authorized to sign for the Company. I know of no written consent from my brother referring to the transfer of the partnership assets to the New York Company, in February, 1917. I received a salary from the partnership, my brother and I dividing \$5,000 as payment to him for being an active partner while my father afterwards divided \$2,000 with my brother, Georg, being his payment as an active partner. Whether I received my share of said \$5,000 from my brother I cannot say. The total salaries were \$7,000 under the partnership to the active partners, I believe.

Whereupon, Mr. Quinn, as counsel for the defendants offered in evidence the waiver of notice and the minutes of a meeting of directors of Stoeck & Sons, Inc. on April 5, 1917, which was marked Defendants' Exhibit E.

The Witness (resuming): I remember being present at a meeting at which a resolution was adopted fixing the salary of the President at \$24,000 per annum, payable monthly with a commission of six per cent of the profits of the Company, provided that the Company should earn and pay a dividend on its capital stock of at least six per cent per annum; I think I acted as the secretary to that meeting; my signature is there.

Whereupon, Mr. Quinn, as counsel for the defendants, then quoted from the minutes of that meeting, in short, that the treasurer should receive a fixed compensation of \$18,000 per annum, and his commission should be five per cent of the profits of the company, payable only in the event that the Company shall earn and pay a dividend on its capital stock of at least six per cent. I do not think that my father or my brother, Georg Stoeck, knew of the voting of those salaries to Hans Stoeck and myself. I do not know whether they approved of it or not,—not to my knowledge. I never saw any written authority from Kammgarn-Spinnerei relating to the contract of February 20, 1917, relating to the 14,900 shares either by the managing director or by any of the other parties, nor by resolu-

243 tion of the board of directors; in fact, there is no board of directors of Stoehr & Company; nor did I see such written authority by the aufseherrat. Hans was a member of that I think from 1910 until he died; I mentioned the other members before. My father was the chairman, Mr. Rosenthal and Mr. Beckman were other members.

Whereupon, Mr. Quinn, as counsel for the defendants, asked the witness whether he remembered an allegation in the bill of complaint alleging that Stoehr & Sons, Inc. on February 20, 1917, became vested with the title to 14,900 shares of the capital stock of Botany Worsted Mills, and the witness replied that if it was in the complaint then he did so remember.

Whereupon, Mr. Quinn, as counsel for the defendants, offered in evidence a letter dated February 9, 1918, signed by Heyn & Covington which, plaintiff's counsel admitted, was the signature of the firm of Heyn & Covington in the handwriting of Mr. Heyn. This letter was admitted in evidence and marked defendants' Exhibit F.

Whereupon, Mr. Quinn, as counsel for the defendants, further offered in evidence a letter dated February 9th, 1918, which was admitted by the witness to bear the signatures of the witness' brother Hans E. Stoehr. The letter was admitted in evidence and marked defendants' Exhibit G.

Whereupon, Mr. Quinn, as counsel for the defendants, further offered in evidence a letter dated February 5th, 1918, to Herbert A. Heyn, which, the witness admitted, was signed by Hans E. Stoehr, which was admitted in evidence over the objection of Counsel for plaintiff as defendants' Exhibit H.

Whereupon, Mr. Quinn, as counsel for the defendants, further offered in evidence as a sample of the voting trust agreement, a
244 copy of the voting trust certificate No. 2 of Stoehr & Sons, Incorporated, as executed, which was received in evidence and marked Defendants' Exhibit I.

Whereupon, Mr. Quinn, as counsel for the defendants, further offered in evidence a copy of the old By-laws of the Botany Worsted Mills that were in existence when this transaction arose, which was received in evidence and marked defendants' Exhibit J.

Whereupon, Mr. Quinn, as counsel for the defendants, further offered in evidence a ballot purporting to bear the date of April 2, 1918, which was admitted by the witness to bear his signature; it was received in evidence and was marked defendants' Exhibit K.

The Witness (resuming): This is called a ballot. I had a written proxy from Stoehr & Sons, Inc., as to that proxy and as far as I know, it was an old proxy that dated back before the time the Alien Property Custodian came in,—it was an old proxy of Stoehr & Sons, Inc.

By Mr. Quinn:

Q. Will you look at the minutes, or the minute book of Stoehr & Sons, Incorporated, and see whether there is any reference in the
index.

The Court: If there is none you may say so.

Mr. Quinn: There is none. I may state there is nothing in the minutes authorizing Mr. Max W. Stocher to act as proxy for Stocher & Sons, Incorporated.

Mr. Marshall: You mean to say there is no resolution on the minutes?

Mr. Quinn: No reference in any of the meetings of any such authority.

Mr. Marshall: It can be done without it.

The Witness (resuming): The records of the executive committee of the Botany were read to and approved by the board of directors of the Botany before the Alien Property Custodian stepped in; it was the custom. After the Alien Property Custodian came in, I have not heard any such minutes read.

Redirect examination.

By Mr. Vorhaus:

Q. Mr. Stocher, I call your attention to the partnership contract, Paragraph 4, that Mr. Quinn read to you, the last concluding part of it:

"The active partners shall have the right to conduct business in such manner as they may think best, except that no transaction involving a value of more than \$25,000 shall be consummated without the written consent of all the partners."

Was that provision complied with at all in the actual conduct of the business?

Mr. Ingraham: I object to that; whether it was complied with or not, it was the agreement between the parties.

The Court: But it could be waived. If they all united on any act it would be enough. If it was the custom in which they did it, that might show it had become a dead letter.

Mr. Ingraham: As affecting the German partners in Germany.

The Court: Not unless they knew it, but I will take the practice.

246 By Mr. Vorhaus: What was the practice with reference to observing that provision that no transaction involving more than \$25,000 could be consummated without the written consent of all the partners, both in Europe and here, to your own knowledge?

A. This paragraph was first enacted upon, and after a while it was found that it was hindering the business.

Mr. Ingraham: I object to that.

By Mr. Vorhaus:

Q. What was your experience?

Mr. Ingraham: He must name a specific instance.

The Court: Yes.

The Witness: I cannot name any specific instance on this matter. It was not in practice after a while; my father bought stocks abroad.

The Court: I do not think it is essential that there should be a specific instance; I think I was wrong in holding him so strictly as that, but, of course, his conclusion he may not state. If he can say that there were instances in which transactions were put through without the consent of the other partners, I will let him state that. I do not say what the effect will be.

The Witness (resuming): I know that Eduard Stoehr bought stocks of textile enterprises in Europe in excess of \$25,000, in excess of 100,000 marks, which would be the practical equivalent
247 at that time of \$25,000. I think it was in 1913, but I was not positive about the year; that purchase was made without my written consent and without the consent or written consent of Hans; as far as I know of Hans; I know that it was made without my written consent. I could not say how many of such stock transactions in excess of 100,000 marks were made without my consent for they were continuously buying stocks and selling stocks.

By Mr. Vorhaus:

Q. How about your acts here, in making sales and purchases in excess of \$25,000?

A. I cannot say anything definite, I have not seen the books of Stoehr & Sons since 1917, I would not know definitely what happened there. I remember that my brother once asked me to comply with that—comply with those wishes, and the next time he did not.

By Mr. Vorhaus:

Q. How about your father's consent and Georg's consent on transactions that you had here in excess of \$25,000?

A. I do not remember whether there were any transactions here in excess of \$25,000. My attention is called to the fifth provision in the fifth paragraph which Mr. Quinn read to me, as follows:

"In the determination of any question relating to the partnership the first party shall have four votes, the second party shall have two votes, and the third and fourth parties shall each have one
248 vote, and in the event that the active partner shall not agree upon a proposition or matter relating to the business, then the question shall be presented for determination to all the parties and the majority vote of all the partners shall be decisive of any such questions."

In the actual administration of the business, in the conduct of the affairs of the partnership, that provision was never referred to nor was any such procedure followed in carrying out the business of the partnership.

By Mr. Vorhaus:

Q. Your attention has been called to the minutes of the meeting of Stoehr & Company, Incorporated, where a resolution was passed voting a salary to Hans as President and a salary to yourself, and also a commission. Will you please state what the conditions were that led up to the making of that resolution?

Mr. Ingraham: I object to that.
Objection sustained.

By Mr. Vorhaus:

Q. I will put it in another form. What was the extent of the business at the time that Stoehr & Sons was formed as a copartnership in this country in 1913?

A. It was a comparatively small business dealing in stocks, securities, mostly a holding company more or less.

Q. What were the conditions in 1917?

A. It was a very live business, dealing in wool, very profitably, and dealing in all kinds of other commodities, and collars,
249 for instance.

Q. How much profits had you made, or had the partnership made, Stoehr & Sons, by dealing in woolsens?

A. As far as I remember over \$500,000, my brother and I took care of that business here.

Q. And before passing that resolution giving you and your brother a salary and commission, did you submit to counsel as to your right and legality to enact a resolution of that kind?

Mr. Ingraham: I object to that.
Objection sustained.

The Witness (resuming): Mr. Heyn, my lawyer, was a member of the firm of Heyn & Covington; he was an American, I think he was born in Milwaukee.

By Mr. Ingraham:

Q. Do you know anything about where he was born or when he was born?

A. I heard from him that he was born West, I think he told me in Milwaukee.

250-255 The Witness (resuming): I think Mr. Heyn died on April 30th, 1918, I am not sure.

256 We will go on with the defendant's case.

The Defendant's Proof.

257 J. DAVIS BRODHEAD, a witness called in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Braldehy:

I am a practicing attorney of twenty-five years' standing and was connected with the office of the Alien Property Custodian during the early part of 1918, as Chief of the Division of Corporations. That Division had charge of American Corporations in which enemy aliens hold shares of stock. As such Chief, I had charge of the cases of the corporate stock owned by enemies in Botany Worsted Mills and Stoehr & Sons, Inc.

Letter written by the witness in behalf of the Alien Property Custodian to Stoehr & Sons, dated January 30th, 1918, calling attention to the report concerning the 14,900 shares in Botany Worsted Mills, was offered in evidence and marked defendant's Exhibit L.

The original letter as offered, was identified by the witness and leave granted to supply a copy of same for the record in this case.

The Witness (resuming): Shortly after this letter was written by me, Heyn & Lenssen, attorneys of New York, had a conference with me in Washington regarding the ownership of stock in both Stoehr & Sons and Botany Worsted Mills. During the conference, which consisted of Lenssen, Heyn, Mr. Duvall, my assistant, and myself, suggestion was made that letters be written to cover all the facts. The explanation given by Mr. Heyn was so complicated that we asked for a written statement from them. We requested them to make a written statement of what they were then telling us verbally, and they undertook to do so. A letter from Heyn & Covington dated February 9, 1918, addressed to the Alien Property Custodian and marked "For the attention of Judge J. D. Brodhead and Mr. Andrew B. Duvall" was received subsequent to this conference with Messrs. Heyn and Lenssen (referring to Defendant's Exhibit F). It was received at the office of the Alien Property Custodian on February 11, 1918, and this explanatory letter is the one we received and was sent to us in pursuance of the conference of which I have just spoken. The letter was written, I believe, in New York, after the return from the conference at Washington.

258 At this conference in Washington, I took up with Heyn and Lenssen, the reconstitution of the Boards of Directors of the two corporations. This was at the first interview. This took place February 5th or 6th. I explained to them that if, after investigation, the Alien Property Custodian was satisfied that the stock or a majority of the stock of this Company was enemy stock, that a demand would be made for the stock and a representation required in the Board of Directors to correspond with the number of shares

which the Alien Property Custodian would become the possessor of, that is the proportion of the stock that the Alien Property Custodian held to the entire, if it was a majority of course the Alien Property Custodian would ask for a majority of the directors. The personnel of the directors was not discussed at that time. I do not recall that I ever discussed with them exactly who would be the appointees of the Alien Property Custodian, because he himself would make the nominations after consulting. Mr. Palmer was Alien Property Custodian and would select the directors. Subsequent to this conference, there was a subsequent conference held at a later date at which the personnel was discussed and settled and Heyn and Lenssen were advised of the names of the Directors selected by the Alien Property Custodian.

Cross-examination:

By Mr. Vorhaus:

The Witness (resuming): The reports of corporations after they had been investigated, were sent to me. These reports came in in great quantities and they were investigated by men who were assigned for that purpose, and when a report disclosed that the subject matter thereof was stock in an American corporation then that report would come to me for further investigation.

Redirect examination.

By Mr. Bradley:

259 The Witness (resuming): After the Board of Directors was reconstituted, so as to include the nominees of the Alien Property Custodian, we looked to the Board of Directors thus appointed to conduct the business of the corporation.

Redirect examination.

By Mr. Ingraham:

The Witness (resuming): We never interfered with the Directors in the administration of the affairs of the Company; the Directors were appointed to direct.

The Court: I will put it to him this way:

Q. Did you yourself, or did you ever in any way assume to direct the directors who were put in these companies or did you give any order to any of your subordinates to do so?

A. No.

Q. Did you ever know of any of your subordinates doing so?

A. No.

Q. Or of anyone else in the Alien Property Custodian's office?

A. No, we ask for reports, of course, from time to time; that is all.

Recross-examination.

By Mr. Vorhaus:

I do not know what Mr. Palmer's orders were or whether he gave any directions to the Directors or what he actually did.

In answer to questions by the Court, the witness testified:

It was our custom to ask the directors from time to time for certain reports. They gave us periodical reports of the conduct of the business, and copies of the minutes.

In response to questions by Mr. Marshall, the witness resumed:

We received periodical reports with regard to Botany Worsted Mills and Stoehr & Sons, Inc., and we kept in touch with the transactions of the corporations and knew just what they were doing.

KARL ZIMMERMAN, a witness called for the defendants, being sworn, testified as follows:

Direct examination.

By Mr. Bradley:

I am Chief Accountant of Botany Worsted Mills and was connected with that concern continuously since 1905. I first came to America in 1898. Prior to becoming Chief Accountant, I was assistant to the Chief Accountant. I have been either accountant or assistant accountant since my connection began. I identify Plaintiff's Exhibit 6, being a sample of the form of corporate stock certificate, blank transfers and talon containing dividend coupons with which I am acquainted. It is the only form which has been in use up to 1919 or 1918. I identify blank sheet headed "Transfers." It is a record of stock representing five shares of the stock of the Botany Worsted Mills. All stock was divided into certificates of five shares, and each page represented one certificate, all certificates being for the same number of shares all five shares. In the Botany's own Record of Stocks, the Botany had a sheet of this form corresponding to a numbered certificate. This numbered certificate had a corresponding page in the Stock Record. When there was a transfer to be made for European stockholders, they were to deposit their certificates with the Vice-treasurer or a Director in Leipzig and with their endorsement on it, and thereupon the vice-treasurer or the Director sent notice to the treasurer in Passaic, the certificate. The form of notice contained in the Corporate book, which I identify was the form used.

A sample of this form of notice was introduced in evidence and marked Defendants' Exhibit M.

261 After receiving advices from the Vice-treasurer or Director at Leipzig in the form marked Defendants' Exhibit M, the transfer was entered on the record of stock on a sheet, a sheet

like this. A form of such sheet identified by the witness was offered in evidence and marked Defendants' Exhibit N.

There were transfers made to Stoehr & Sons, Inc., on the books of the Botany Mills in this record in the absence of either a certificate from Leipzig or the production of the stock certificate bearing the proper transfer at the Passaic office in America, and this was the only exception as far as I can remember. The only transfer on the transfer record of stock of the Botany Worsted Mills that appears without either the production of the certificate at Passaic or a certificate on file from Leipzig is the transfer to Stoehr & Sons, Inc., as far as I can remember.

By Mr. Bradley:

Q. Mr. Zimmerman, I hand you now a confirmation of transfer from Plagwitz-Leipzig dated January 15, 1915, signed by Georg Stoehr and purporting to certify that certain certificates mentioned therein had been lodged with him in Leipzig endorsed to Hans E. Stoehr, as trustee. Will you identify that as a letter coming to your knowledge?

A. Yes.

The Witness (resuming): I have seen that Certificate before. It was made in Passaic. It was made in the United States. George Stoehr at the time that Certificate came to my hands was here in the United States. This certificate and the certificates representing this stock were not exhibited to me in connection with that transfer.

Whereupon, certificate 236 was offered in evidence, and marked Defendants' Exhibit O, which was read into the record as follows:

"Certificate No. 236."

The stub reads:

262 "Confirmation of transfer; date February 15, 1915.
Certificate No. 51—1,050 (which I take to mean covers
1,000). 3,441-3,500, 4,061-5,000.
Shares No. 251-5250, 17201-17500, 20301-25000. To Mr. Hans
E. Stoehr as Trustee, New York City."

The confirmation side reads as follows:

"236—Plagwitz-Leipzig, January 15, 1915.

To the Treasurer of the Botany Worsted Mills, Passaic, New Jersey.

DEAR SIR:

I hereby certify that certificates No. 51-1050, 3441-3500, 4061-5000, representing shares No. 251-5250, 17201-17500, 20301-25000, of the capital stock of Botany Worsted Mills has been deposited with me properly endorsed to Mr. Hans E. Stoehr as trustee, New York,

with the request to cause the same to be transferred upon the books of the company to the above named endorsee.

Yours truly,

GEORG STOEHR,
Vice President."

By Mr. Bradley:

Q. Just identify please the confirmation of transfer in this same books dated February 1, 1915 signed by Georg Stoehr and purporting to certify the deposit of stock certificates mentioned therein endorsed to Max Stoehr as trustee?

A. Yes.

Mr. Bradley: I offer certificate No. 238 in evidence.

Said certificate was offered in evidence and marked Defendants' Exhibit P.

This exhibit reads as follows:

The stub reads:

"Confirmation of transfer—February 26, 1915.

Certificate No. 1051-1400, 2004-2017, 2041-2060, 2151-2171, 2861-2884, 2890-2898, 3161-3260, 5251-5369, 5389-5411, 5451-5750.

Shares No. 5251-7000, 10016-10085, 10201-10300, 10751-10855, 14301-14420, 14446-14490, 15801-16300, 26251-26845, 26941-27055, 27251-28750.

To Mr. Max W. Stoehr, as Trustee, Passaic, New Jersey."

263

This certificate itself reads:

"Plagwitz-Leipzig, February 21, 1915.

No. 238.

To the Treasurer of the Botany Worsted Mills, Passaic, New Jersey.

DEAR SIR:

I hereby certify that the certificates (numbers correspond with those mentioned in the stub) representing shares (corresponding to the numbers in the stub) of the capital stock of the Botany Worsted Mills has been deposited with me properly endorsed to Max W. Stoehr as Trustee of Passaic, New Jersey with the request to cause the same to be transferred upon the books of the company to the above named endorsee.

Yours truly,

(Signed)

GEORG STOEHR,
Vice President."

Mr. Bradley then asked the witness the following questions, to which the witness replied as follows:

Q. I call your attention to the fact that the other forms of certificates in this book are printed whereas these two, No. 236 and 238 are typewritten. Will you explain how that came to be?

A. As far as I remember, I received those certificates to be transferred. I filled in the numbers. I received the numbers and I filled them in on the typewritten form.

Q. At whose instruction did you do that?

A. It was either Mr. Hans Stoechr or Mr. Georg Stoechr, that I cannot remember any more.

Q. You do not remember which?

A. No; it is five years ago.

Q. Did you know that Mr. Georg Stoechr was in this country at that time?

A. I knew he was in this country, yes.

Q. Were or not the certificates themselves exhibited at that time?

A. I have not seen them.

264 Q. They were not exhibited to you?

A. No; they were not exhibited to me.

Q. In point of fact, Mr. Zimmerman, do you know of your own knowledge that those certificates to which Georg Stoechr certified in those two confirmations of transfers were not in this country at that time?

A. I did not see them.

Q. They all run to Kammgarn-Spinnerei Stoechr & Company Aktiengesellschaft, do they not?

A. Were in Kammgarn Spinnerei Stoechr & Company.

Q. And they aggregated, did they not, 14,900 shares?

A. Yes, they did.

Q. 10,000 of those shares were transferred to Hans?

A. Yes.

Q. And the remaining 4,900 to Max?

A. Yes; as trustee.

The witness then resumed:

When transfers were made at Passaic the practice about requiring the production of a certificate was that a certificate had to be presented to the Treasurer with the endorsement thereon.

Witness identified a Certificate of stock of the Botany Worsted Mills that had theretofore been transferred, merely for the purpose of showing the practice and testified that on the transfer on the back of the certificate appear in the rubber stamp these words "Transfer registered on the books of the company, dated January 30, 1914."

This was a uniform practice when certificates were presented for transfer at Passaic. I did not make out any new certificates at all.

By Mr. Bradley:

Q. I direct your attention now, Mr. Zimmerman, to one page of what you have mentioned as the record of transfer, Exhibit N. I am going to read you what appears on this page.

265 Mr. Vorhaus: Is this the transfer in February, 1917?

Mr. Bradley: This is a transfer of February 20, 1917. I will read this:

"Five shares of \$100 each, equal to \$500 of the capital stock of the Botany Worsted Mills, Passaic, New Jersey, incorporated 1889, under the laws of the State of New Jersey.

Certificate No. 51, shares 251 to 255 owned by Kammgarn Spinnerei Stoechr & Company."

Under that is a subdivision the caption of which is "Assessments."

"First installment of 25 per cent paid with \$125 for above named five shares at treasurer's office on September 30, 1890. C. O. Kepler, Treasurer."

Below that:

"Second installment of 25 per cent payment of \$125.00 for above named five shares at treasurer's office on June 1, 1890; Oscar Dressler."

"Third installment of 25 per cent payment of \$125.00 for above named five shares at treasurer's office, through Allgemeine Deutsche Credit Anstalt on March 1, 1891."

Signed by the Treasurer.

"Fourth installment of 25 per cent payment of \$125.00 for above named five shares at treasurer's office, through Allgemeine Deutsche Credit Anstalt on September 1, 1891."

Signed by the Treasurer.

Then there follows under the caption "Transfers" the following:

"The first is a red ink stamp covering the space printed for two blanks and reads as follows:

"It is hereby certified that satisfactory proof having been furnished that Kammgarn Spinnerei Stoechr & Company changed its name on June 27, 1899 to Kammgarn Spinnerei Stoechr & Company Kommanditgesellschaft, and further changed its name on June 30, 1911, to Kammgarn Spinnerei Stoechr & Company Aktiengesellschaft, the capital stock represented by this certificate for five
266 shares of stock has this date been duly entered on the stock and transfer books of the Botany Worsted Mills as owned by the Kammgarn Spinnerei Stoechr & Company Aktiengesellschaft, dated Passaic, New Jersey, March, 1912."

And signed F. W. Kuhn, Treasurer.

Then below that appears in a separate bracket partially printed and partially shown by a rubber stamp, the following:

"Transfer to Hans E. Stoechr as trustee (the words "Hans E. Stoechr as trustee" being in rubber stamp, and the words "transferred to" being printed), by deposit of certificate with (those being printed words) Georg Stoechr, Vice President (the last mentioned being a rubber stamp) dated Passaic, New Jersey, February 15, 1915 (the

words "Passaic, New Jersey" are printed and the date is in rubber stamp)." .

Then the rubber stamp signature of F. W. Kuhn, Treasurer.

On the margin in rubber stamp there appears the words "Transfer registered on the books of the Company, date February 15, 1915."

The next is as follows:

"Transferred to (printed) Stoehr & Sons, Inc., New York (rubber stamp) by deposit of certificate with (printed) George Stoehr, director (rubber stamp), Passaic, New Jersey (printed) February 20, 1917 (rubber stamp). Then signed with a rubber stamp "Hans E. Stoehr", and printed "Treasurer."

Mr. Marshall: It may appear that there are 2,089 pages to the same general effect as those representing the 10,000 shares of stock referring to the stock which was held in trust by Hans E. Stoehr and the remainder in the name of Max W. Stoehr as trustee; is that correct?

267 Mr. Bradley: Yes, and finally all transferred to the name of Stoehr & Sons, Incorporated, on the books of the Company.

The Witness (resuming): In reference to the transfer of these shares to Stoehr & Sons, Incorporated, New York, I have not seen any certificate from Leipzig on file at Passaic. There is none in that book nor have I seen any in the office of the Botany Worsted Mills. It is not in the record of transfer book which you handed me a few minutes ago. It was not presented to me nor did it come to my knowledge in any way. There was no evidence in the office of the Botany Worsted Mills at the time this transfer was made that there was any deposit of the certificate with Georg Stoehr, director; nor did I have or see any writing to that effect at all. There were some other shares that were transferred from Stoehr & Sons also where the memorandum was made to appear that there had been a deposit of a certificate when in point of fact we have no evidence of that deposit. This was at the same time, on the same date as part of the same transaction. That is the only instance as far as I know. I had charge of these books, this record and I made this notation of transfer to Stoehr & Sons, Incorporated at the direction of Mr. Hans E. Stoehr.

By the Court:

Q. I understand that when a Leipzig stockholder made a transfer, you got word of it from Mr. Georg Stoehr, you put his name in here "By deposit of certificate with Georg Stoehr, director" just the same?

The Witness: Yes.

The Witness (resuming): I recall the date, about 1915, January or February, when there was entered in the record book a
268 transfer of these 14,900 shares to Hans and Max Stoehr, trustees, 10,000 to Hans and 4,900 to Max. After that transfer was made, the dividends afterwards declared on that stock were credited and paid to Kanungarn Spinnerei Stoehr & Company for

the years 1915 and 1916, I think. The dividends on these shares after the transfer to Max and Hans were not paid to them or to either of them; they were all credited to Kammgarn Spinnerei and paid to them up to and including 1916—they were credited in their account current. They used to be paid to Kammgarn Spinnerei Stoechr & Company after the transfer to Max and Hans as trustees respectively but they were not paid as dividends; there were probably some other remittances made because it was a regular account current; they were credited to them in the account and then they were accounted for against some other transaction. After the contract of February 20, 1917 and the notation on this record of the transfer of the shares to Stoechr & Sons, Incorporated, the dividends of Botany Worsted Mills to Stoechr & Sons were credited on the special account; some dividends were paid to them but not on these shares. The dividends on these shares were credited on a special account. As to the 10,000 shares which were transferred to Hans E. Stoechr as trustee and as to the 4,900 shares transferred to Max Stoechr as trustee, all of which were finally transferred to Stoechr & Sons, Incorporated, no dividends were actually paid by Botany to Stoechr & Sons, Incorporated, on those shares. The dividends on those shares were merely credited to a special account. No dividends were paid out of that special account.

When asked by the Court "In whose name was the special account?", the witness responded "Stoechr & Sons, Incorporated, Special Account".

The Witness (resuming): I had first hand knowledge of an entry on the books of Botany Worsted Mills of a credit to its account on February 20, 1917, of \$5,000 and a debit against Stoechr & Sons, Incorporated, on the same date of the same amount, which entries were made by the instructions of Mr. Hans Stoechr.

209 The witness then identified a correct copy of the letter received on that date, which Mr. Bradley read into the record as follows:

"February 20, 1917.

Botany Worsted Mills,
Passaic, New Jersey.

GENTLEMEN:

Please pay to Kammgarn Spinnerei Stoechr & Company the sum of \$5,000 to February 20, 1917 and charge our account for the amount under advice.

Yours truly,

(Signed)

STOEHR & SONS, INCORPORATED,
HANS E. STOEHR,
President."

The Witness (resuming): It was credited to Kammgarn Spinnerei Stoechr & Company in their current account, the dollar account.

Mr. Marshall then asked the witness a few questions in reply to which he testified as follows:

We had two different accounts, a mark account and a dollar account. The dollar account was opened, and about the beginning of the war when the fluctuations in the exchange became too wide—formerly we used to have every trade on 4.20, and all the transactions were based on that rate, but after the war had started and the fluctuations in the foreign exchange became too wide, there was a separate account opened. Stoeck & Company, Incorporated, was a creditor of the Botany and if the Botany was indebted to them in excess of the sum of \$5,000, they therefore transferred \$5,000 of that credit to the Kammgarn Spinnerei on the books of the Botany.

Mr. Bradley then continued and the witness resumed:

At the time this letter was received I think there was a balance. I think there was a large transaction that was dated January 270 27th or January 15th and that would make a credit to Hans on the account of Stoeck & Sons.

Whereupon, Mr. Bradley, as counsel for the defendants, handed Mr. Zimmerman a transcript of the account with Kammgarn Spinnerei Stoeck & Company, special account, as per book record, account current, extending from December 1st, 1914 down to and including November 29th, 1916, and showing the account to have been closed under date of November 29, 1916, by transferring the balance then due by Botany to Kammgarn Spinnerei, amounting to \$270,817.43, to the account of Stoeck & Sons, New York. The witness then stated that the statement was a correct transcript from the original entries in the books of the Botany Worsted Mills. That particular entry bore the date of November 30th, 1916.

When asked by Mr. Marshall what the result of that was, the witness replied "There was a balance due to the Kammgarn Spinnerei Stoeck & Company on November 29, 1916 of \$270,817.43 from Botany and then was transferred to the credit of Stoeck & Sons, the partnership."

In response to questions put by Mr. Bradley, the witness resumed:

That was made by the instructions of Mr. Hans E. Stoeck. I did not see any writing from Kammgarn Spinnerei authorizing that transfer—none came to my knowledge; I acted upon instructions of Mr. Stoeck.

The statement was then marked Defendant's Exhibit Q.

271 The Witness (resuming): It was a part of my duties to attend the meetings of stockholders as they were held from time to time as I was Judge of elections.

By Mr. Bradley:

Q. State whether or not there was uniformly written authority from Kammgarn Spinnerei to vote this stock when it was voted at

these various meetings of the stockholders, and if not what exceptions were there?

By the Court:

Q. Was there always written evidence of the right to vote, always a written proxy from the Kammgarn Spinnerei to vote this stock?

The Witness: As far as I can remember.

By Mr. Bradley: As far back as you can remember there always was that?

The Court: He did not say as far back.

The Witness: I said as far as I can remember.

Mr. Marshall: He means so far as he can remember.

The Witness (resuming): I know now of this contract of February 20th, 1917; I did not know it at the time it was made. I knew that a corporation came into existence. The account current 272 between Stochr & Sons and Botany was simply noted on the ledger, "Stochr & Sons, Incorporated," since February 20th. I think that in the accounts current it was marked February 28th. It is simply marked there without changing the account at all or opening up a new account. As to by whose instructions that was done, as far as I remember, Mr. Hans Stochr told me to mark the account "Stochr & Sons, Incorporated."

Direct examination.

By Mr. Quinn:

Mr. Quinn, as counsel for the defendants, handed the witness a statement of dividends paid to Stochr & Sons, New York; this sheet is first entitled "Dividends paid to Stochr & Sons," and then "Dividends paid to Stochr & Sons, Incorporated, New York," all of which the witness stated he prepared from the books in his possession and that the figures and facts therein were correct according to the books in his possession. Whereupon, Mr. Quinn offered it in evidence.

By Mr. Vorhaus:

Q. This statement here I call your attention to is supposed to have been acknowledged before a notary public; is that in the book?

A. That is a notation that is in the book.

Q. Who made the notation?

A. My assistant at the time he made the entry in the journal.

Q. Is that entry in the book or is that an inference somebody drew?

A. That is an inference (indicating).

Q. Is not that other part an inference too?

A. It is in the books.

Q. Which is it, is it in the books or is it an inference?

A. It is in the books; it is in the entry in the books.

273 Mr. Quinn, as counsel for the defendants, then asked the witness whether every word of that statement is in the books, and, the witness responding "Yes," Mr. Quinn again offered it in evidence and it was received in evidence and marked defendants' Exhibit R.

The Witness (resuming): Referring to Exhibit R, the 1,120 coupons represented 5,600 shares and where the 1,120 appears twice in the statement of dividends paid to Stoehr & Sons, the partnership, that means that was coupon No. 52 of 5,600 shares and coupon No. 53 of 5,600 shares, and so again referring to Exhibit R containing the statement of dividends paid to Stoehr & Sons, Incorporated, the figures 258 coupons refer to 1,290 shares and again the 258 refers to 1,290 shares; and then the 880 coupons refer to 4,400 shares, and then the 880 coupons refer to 4,400 shares. Dealing with the period on the second part of this statement, Exhibit R, Stoehr & Sons, Incorporated, had certificates in this country for the 1,290 shares and hence there was a distinction made in regard to dividends between the dividends on the 1,290 shares and the dividends on the 4,400 shares.

274 I have prepared a statement from the books of the Botany Worsted Mills regarding the transfer of the 5,600 shares of Botany Worsted Mills stock into the name of Stoehr & Sons and from them to Stoehr & Sons, Incorporated and the paper which I hold (Mr. Quinn handing paper to witness) represents what appears in the books of the Botany Worsted Mills; there is nothing in that statement that does not appear on the books of the Botany Worsted Mills.

Whereupon, Mr. Quinn, as counsel for the defendants, offered the above statement in evidence and it was marked Defendant's Exhibit 8.

The Witness (resuming): With reference to the first page of Exhibit 8, out of the 4,180 shares, 250 were deposited with the treasurer for transfer in Passaic.

275 By Mr. Quinn:

Q. As a matter of fact, this Exhibit 8 deals with the 5,600 shares, and is it not a fact that out of that 5,600 shares certificates for 1,290 were deposited with the treasurer in Leipzig.

Mr. Vorhies: We object to that.

Mr. Quinn: I do not mean Leipzig; I mean Passaic; the treasurer in Passaic?

The Witness: No; not 1,290.

The Court: You have already agreed on that very early in the case. It has been agreed at the very outset that out of the 5,600 only 1,290 were in this country.

Mr. Quinn: I want to show the physical facts in regard to the transfer.

The Court: What do you want to show?

Mr. Quinn: That the only shares that were transferred here so far as the Botany is concerned was the 1,290.

The Court: That is already in.

Mr. Vorhaus: The whole thing was transferred.

The Court: You agreed that only 1,290 certificates were in this country.

Mr. Vorhaus: Yes.

Mr. Quinn, as counsel for the defendants, then handed the witness a paper on one sheet entitled "Dividends paid on 14,900 shares from February 20, 1917 to January 24, 1920, which the witness identified, stating that he had prepared it and that it was a correct statement according to the books of the company under his direction. Mr. Quinn then offered it in evidence and it was received in evidence and marked Defendants' Exhibit T.

The Witness (resuming): I prepared a statement of the book value of the capital stock of the Botany Worsted Mills as of certain dates, together with Mr. Helmer and also prepared a statement of the book value of the stock of the Botany Worsted Mills as of November 30th, 1917.

By Mr. Quinn:

Q. What was the book value per share of the stock of Botany Worsted Mills on February 20th, 1918, as of November 30th, 1917?

Mr. Marshall: It might be desirable to know what was included in the book value. I do not consider it of any consequence now.

The Court: I think if they raise the objection that they are entitled to find out how he reached it.

The Witness (resuming): We reached the book value as follows: We took the capital stock, the reserve fund of \$1,050,000, and the surplus and divided the total by 36,000 shares; that gives the value per share.

By Mr. Marshall:

Q. May I ask you whether that included hard assets?

A. I do not know.

In answer to questions put by the Court, the witness stated:

277 There is no item on the books of good will; there is no item on the books but the stock on hand, accounts receivable, real property and plant.

The Witness (resuming): In making up the book value and computing the book value, I took no account and made no allowance or gave no allowance for an increase on any installment for good will.

By the Court:

Q. Nothing like patents or trade-marks, no items of that sort?

A. No.

The Witness (resuming): The book value as of November 30, 1917, was \$317.98238.

By Mr. Quinn:

Q. And as a matter of arithmetic, on that basis what was the book value on November 30, 1917 of 14,900 shares of the stock of the Botany Worsted Mills.

A. The book value of the 14,900 shares is \$4,737,937.46.

Q. Now then, one fifth of that was how much?

A. One fifth of that was \$947,587.49.

Q. Will you kindly add to that the amount of the dividends——

The Court: Have you not got that all on your statement?

Mr. Quinn: If they want to take it, that statement gives the whole story.

The Court: They will take that.

278 Mr. Vorhaus: Put it in.

Whereupon, said statement was marked Defendants' Exhibit U.

Mr. Vorhaus: Your Honor understands we do not conceive that his estimate of how they figured the book value is binding on anybody.

Thereupon, Mr. Quinn, as counsel for the defendants offered in evidence a list of two sheets of paper giving in column form the directors and officers of the Botany Worsted Mills beginning March 17, 1914, which the witness identified and stated he had prepared according to the books of the company, and that it was correct according to the books of the company. It was then marked Defendants' Exhibit V.

The Witness (resuming): I have searched the letter files of the Botany Worsted Mills for correspondence between Kammgarn Spinnerei and the Botany Company in the years 1915 and 1916.

By Mr. Quinn:

Q. I show you a letter purporting to be by Kammgarn Spinnerei dated the 2nd of March, 1915 to the Botany Worsted Mills and bearing the stamp of the accounting department March 31, 1915; another letter dated March 9, 1915 from Kammgarn Spinnerei to the Botany Worsted Mills stamped "Received May 31, 1915;" another letter from the Allgemeine Deutsche Credit Anstalt dated the 5th of June, 1915 to the Botany Mills and stamped "Received June 28, 1915;" another letter dated June 5, 1915 from Kammgarn Spinnerei Stoehr & Company to the Botany Worsted Mills stamped as received in the accounting department June 22, 1915.

279 The Court: You may identify those afterwards; are those the only letters?

Mr. Quinn: No. I will identify them later.

The Witness (resuming): These twelve letters were the letters that I have found relating to dividends and financial transactions between the two companies.

Mr. Quinn: I offer those twelve letters as one exhibit.

Mr. Marshall: I object to them as immaterial.

The Court: I will exclude them; you may have them marked for identification.

Marked Defendants' Exhibit W for identification.

Mr. Quinn: I assume your Honor will rule the same with regard to the answers by the Botany to the Kammgarn Spinnerei.

The Court: Yes; you may have those marked.

The Witness (resuming): I have searched the records of Botany Worsted Mills for any written power of attorney purporting to be given by Kammgarn Spinnerei to Hans E. Stoehr for the years 1915, 1916, 1917, or 1918 but I have found no such authority nor any copy of a resolution from Kammgarn Spinnerei's board of directors, nor anything under the seal of the company conferring authority or purporting to be, on Hans E. Stoehr.

280 By Mr. Marshall:

Q. You made this search among the papers and documents in the Botany Worsted Company?

A. Yes.

By Mr. Quinn:

The Witness (resuming): I do not think there was a vice treasurer at Leipzig of the Botany Worsted Mills in either 1914 or 1915 or 1916 or 1917. There was a vice treasurer elected by the board at one of those meetings, Hans E. Stoehr, but not at Leipzig; there was no vice treasurer at Leipzig elected in any of the years from 1914 to date. In reference to the book entitled, "Confirmation of Transfers," there was a corresponding book in Germany, both books having been printed in the United States.

In answer to a question by Mr. Quinn as follows:

"Referring to the certificate on stub No. 236 which purports to be dated Plagwitz-Leipzig, January 15, 1915, and No. 238, which purports to be dated Plagwitz-Leipzig, February 1, 1915, I call your attention to the fact that between those two typewritten papers, one No. 236, and dated January 15, 1915, and one Numbered 238, and dated February 1, 1915, there is a printed one, Number 237, dated January 28, 1915, and ask you if you can explain why the two certificates, 236 and 238, do not follow each other?"

the witness resumed:

281 The one on Transfer Exhibit O was confirmed February 15th, the one dated January 15th was confirmed February 15th, and the second one, Exhibit P, was confirmed February 26th; the intervening one is dated April 12th. The reason why they do not follow consecutively, why the one of April 12th comes in

between the one of January and February is that that transfer was held up on account of there was an inheritance tax connected with it. We had to get the permission from the Comptroller to transfer it. I looked that up and I made a copy of the letter. Georg Stoehr or Hans E. Stoehr gave both Number 236 and 238 to me in blank and instructed me to fill in the blanks, which I did in my own handwriting, filling in the words in Number 236, of January 15, 1915. When the typewritten form was handed to me it was all blank except the typewritten words, and then in number 238 I also filled in in my own handwriting the words "February 1, 1915." I also filled in all the numbers. I told Mr. Bradley that either Mr. Hans E. Stoehr or Mr. Georg Stoehr told me to fill in the words as to the assignee, Mr. Hans E. Stoehr, as trustee, but I cannot remember which; I did this according to the directions, and the same as to the Number 238, Mr. Max W. Stoehr as trustee. I cannot explain now any more how number 236 was entered on the stub on February 15th and 238 not entered until February 26th; that is five years ago. I must have received instructions. I do not think that I received both of these certificates at the same time, at the same date and I do not know whether I received them from the same person; I cannot recollect that. I cannot state any reason why the dates in 236 and 238 should be different, one January 15, 1915, and the other February 1, 1915; I cannot recollect when I was told to fill those in according to that date why they were to be filled in according to those dates. I made the whole stubs, all the entries in the stubs of the No. 236 and 238, except those that are printed and, as far as I know, the typewritten parts of those two certificates were the only times in either of the two books of confirmation of transfer, where such typewritten forms were used. I have not looked through the books but I will do so. I did not inform myself about such a transaction as this before filling in blanks in this way; heretofore I received the printed ones from Germany; certified by a director from Germany or a vice treasurer, when there was a vice treasurer, and then made the entries in the stub and then confirmed direct to Leipzig. I made it out, I do not know whether it was mailed to the director or the corporation in Germany in this case. I gave the two papers to Mr. Hans Stoehr. These two confirmations would be dated the same day as the transfer. I handed them, as far as I can remember, to Mr. Hans E. Stoehr, and then he probably gave them to Georg. What he did with them I do not know. As to No. 236, that would be February 15, 1915, and as to 238 it would be February 26, 1915. I cannot tell whether those two certificates were typewritten in the Passaic office or in the New York office. As I recall (looking at 236 and 238) they were written on the dates that they purport to be written, February 15th. There is no significance in the fact that the entries in the stub are in purple ink, and the entries in my handwriting in the bodies are in black ink; that does not mean anything to me that they were made in different places. It may be that that was written with con-~~vinc~~ink. It is the custom of the company to always send a press copy with the

following mail, and I think that is probably why that was written. I do not think that I would write the rest in copying ink if I did that, because that would not be copied. The one that is in the
283 stub, that will probably be written in copying ink; that is the best explanation I can make for the difference in those.

By Mr. Quinn:

Q. Referring to the transfer in the special account of Kammgarn-Spinnerei, with Botany Worsted Mills, which is Defendant's Exhibit Q, I would ask you whether there was any resolution of the Board of Directors of the Botany Worsted Mills authorizing that transfer on November 29, 1916, from the account of Kammgarn-Spinnerei to Stoehr & Sons, the partnership.

The Witness (resuming): There was no resolution of the Board of Directors to my knowledge of the Botany Worsted Mills authorizing the transfer of \$270,817.43 on November 29, 1916, from the account of Kammgarn-Spinnerei to the partnership, Stoehr & Sons. At the top of said Exhibit Q appear the words "Special Account" and Karl Jacobson. Karl Jacobson was the mailing address in Copenhagen and the Botany Worsted Mills in communicating with Leipzig toward the end of the war, as the war went on, communicated through Karl Jacobson and received communications from Kammgarn-Spinnerei through him. That was in the later stages, before we came into the war. As the British censorship became more difficult, this method came into vogue in 1915. I have searched the files of the Botany Worsted Mills for a letter authorizing Hans E. Stoehr to deal with certain stockholdings of Kammgarn-Spinnerei but have found none. I have also searched the files of Botany Worsted Mills for a letter authorizing Hans E. Stoehr to deal with the balances of Kammgarn-Spinnerei, but have found none.
284 The search covers the years 1914, 1915, 1916, and so on; there was no mail after 1916.

The Court: I understand there was no communication received during the year 117, before April 6th, at all.

The Witness: No.

In answer to questions by Mr. Marshall, the witness stated:

As far as I know there was nothing found in the records of the Botany Company. They may have received a wireless, but there is nothing in the records.

By Mr. Quinn:

Q. Coming down to the transfer of February 20, 117, from the name Kammgarn Spinnerei to Stoehr & Sons, Incorporated, of 14,900 shares, will you state whether there was any confirmation to Kammgarn Spinnerei from the Botany of those transfers?

By the Court:

Q. Was there any copy of a letter of confirmation from the Botany Mills to the Kammgarn Spinnerei of the transfer of the 14,900 shares on the books of the Botany Mills as of February 20, 1917?

A. No, there is none.

The Witness (resuming): I do not know whether I saw Georg Stoechr in the United States in February or January, 1917; 285 I remember seeing him in the early part of 1915. The Botany Worsted Mills never received any certificate from a Vice-treasurer at Leipzig or from a Director, resident at Leipzig on or after February 20, 1917, certifying to a transfer or assignment from the Kammgarn Spinnerei to Stoechr & Sons, Incorporated. I have carefully searched the files of the Botany Worsted Mills to find any paper, letter, resolution, document, from, or purporting to be by Kammgarn Spinnerei Stoechr & Company relating to the transfer of the 14,900 shares from its name on February 20, 1917, to Stoechr & Sons, Incorporated, but have found none. I have also searched the files of the Botany Worsted Mills for any letters or correspondence or order from Stoechr & Sons, the partnership, regarding the transfer to Stoechr & Sons, Incorporated, of the 5,690 shares, but have found none. I transferred the 5,690 shares from the name of the partnership Stoechr & Sons to the name of the corporation on the direction of Hans E. Stoechr personally to me. Some of the certificates were delivered for transfer. 1,290 out of the 5,690 shares were transferred from the name of the partnership Stoechr & Sons, to the name of the corporation, on the sole direction of Hans E. Stoechr, personally to me. I have searched the files and the records of the Botany Worsted Mills to see whether any demand was ever made by Mr. Max W. Stoechr or anyone on his behalf on the Botany Worsted Mills or any of its officers or directors for the re-transfer of the 14,900 shares to Stoechr & Sons, Incorporated, but have found none. As far as I know the Botany Worsted Mills received no protest by or on behalf of Max W. Stoechr in writing against the issuance of the 14,900 shares to the Alien Property Custodian.

286 Cross-examination.

By Mr. Vorhaus:

The Witness (resuming): At the time I made the transfer of the \$270,000, that was due to the Kammgarn Spinnerei to Stoechr & Company, Inc., I did not have any authority or any letter from Kammgarn Spinnerei consenting to the transfer; the Botany wrote a letter confirming the transfer to Stoechr & Sons. I made that transfer on the say-so of Hans E. Stoechr, whose authority I did not question. Botany wrote to Stoechr & Sons, but I have no record of whether they wrote to Botany that they made the transfer

to Stoehr & Sons or that Botany wrote to Kammgarn Spin-
nerel. There is no doubt that these new certificates, standing in
the name of Hans and Max as trustees, were made on the date they
bear in 1915, February, 1915, and February 26th.

Answering a question by the Court, the witness stated:
The entry on the books was made on those dates.

By Mr. Vorhaus:

Q. After that entry was made on those books in 1915 and
287 1916, whenever that 14,900 shares of stock was voted on, it
was voted on by Max and Hans, was it not?

Mr. Quinn: I object to that; the votes are the best evidence on
that.

The Court then asked the witness whether he could answer that
question, to which he replied: I can, yes; the 10,000 shares were
voted by Mr. Hans E. Stoehr as trustee in the meeting of March
16th and the 4,900 shares were voted by Mr. Georg Stoehr.

In answer to a question by Mr. Quinn the witness stated:
I am referring to 1915, the time the transfer was made, because
the list of the stockholders was made up twenty days prior to the
meeting.

By Mr. Vorhaus:

The Witness (resuming): But after 1915, as far as I can recollect,
whenever those stocks were voted on, they were voted on by Max
and Hans, with the 14,900.

In answering questions by the Court, the witness said:

The only year was 1915; in 1917, it was Stoehr & Sons; the state-
ment would show that.

The Witness (resuming): 10,000 had been transferred and were
voted upon by Hans, and the other 4,900 had not within the twenty
days prior to the stockholders' meeting.

288 A. MITCHELL PALMER, a witness called in behalf of the de-
fendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Bradley:

I held the office of Alien Property Custodian from about October
22nd, 1917, to March 5th, 1919. I think I am right about October
22nd. It was on or about October 22nd, I was commissioned.

By Mr. Bradley:

Q. This suit concerns 14,900 shares of the capital stock of the Botany Worsted Mills, and involves, among other things, a contract purporting to be made by Kammgarn Spinnerei Stoehr & Company, a German corporation, with Stoehr & Sons, Incorporated, a New York corporation. It appears that directors nominated by you were installed in Stoehr & Sons, Incorporated, namely, James N. Wallace, Francis B. Garvan, Andrew B. Duvall. In the bill that is averred that this is a suit by the minority stockholders, that said defendant directors of said Stoehr & Company, Incorporated, are the creatures of, and were nominated and elected by and through the orders of said defendant, A. Mitchell Palmer, as Alien Property Custodian, and to carry out his instructions, and that it would be useless to make a demand upon such defendant directors to institute this suit, and for this reason, he is obliged to appeal for relief to this Court: Please tell the Court whether you at any time gave any instructions to these, or any other directors, concerning the action they should take with respect to the matter committed to those gentlemen's direction.

Mr. Marshall: We object. The allegation here is that these directors, having been nominated by him, any attempt to
289 ask them to present this suit would be useless.

The Court: I will take it.

The Witness (resuming): No instructions were ever given to the Directors of the Company by the Alien Property Custodian as to any acts that they should or should not perform; they were originally installed after their nomination by the Alien Property Custodian to represent the stock which had been transferred to him, or which was enemy owned and therefore was properly to be transferred to the Alien Property Custodian. But after they were installed they were under our general instructions to all directors, given a free hand to exercise their own business judgment and discretion with respect to all matters affecting the company's business and they were so instructed. I recall Mr. Wallace. I know Mr. Duvall very well and also Mr. Garvan.

I never directly or indirectly took possession of any of the properties of either of these defendants.

Mr. Vorhaus: We move to strike that out. The acts, if your Honor please, which constituted possession are before the Court. It is a conclusion of law and a question of law whether they were taken by due process of law.

The Court: Of course, you do not get possession by taking over the stock and putting in the directors.

Mr. Vorhaus: They are in possession, if your Honor please.

The Court: If you will concede that no act was done, that
290 you will claim nothing under your bill more than the seizure of the stock and the appointment and election as stockholders of the directors, that will answer the objection.

Mr. Marshall: We do not claim any other possession than that taken of the control of the stock, and through the control of the stock, the election of the directors. We do not claim any individual possession.

Mr. Bradley: We understand that to be a concession there was no physical possession taken of any of the property of the company?

Mr. Marshall: By Mr. Palmer. The directors merely control the corporation. That is as far as we can go.

The Court: I shall not rule the directors had possession of the assets. The corporation has possession of the assets. They are merely the agent of the corporation. Certainly, the fiction of the corporate entity goes so far as that.

The Witness (resuming): I did not authorize anyone under me or in my organization to control the judgment and discretion of directors in this, or any of the companies under my control. In fact, I was very careful to have directors understand that they were expected to exercise their own judgment in the operation of all these enemy companies, in which they had been installed; that this pair of companies, this Stoehr Company and the Botany Company have such large properties I took the trouble to attend the first meeting of the Board of Directors of the Botany Company after the directors representing the Alien Property Custodian, as owner of the

291 enemy stock which had been installed, and at that meeting I expressly stated to all the directors that it was our wish and purpose and desire that they should feel themselves perfectly free to exercise their own judgment in relation to all business matters of the corporation; that I had invited the biggest business men, bankers and manufacturers whom I could persuade to accept these directorships that I desired to place upon them the duty and the responsibility of properly managing this great business, and that having that desire in my mind, I expected also to give them entire power to do so. Mr. James N. Wallace was then president of the Central Union Trust Company, a very large bank in this city, one of the leaders, I think of the Financial World in New York. The other men were all men of high business standing also.

Mr. Bradley, as counsel for the defendants, then stated to the witness that one of the conditions of the sale of the stock of the Botany Worsted Mills was that no one would be permitted to inspect the plant until he should have qualified as a bidder or shall have deposited with the director of sales a certified check for \$25,000 and requiring a cash deposit of \$100,000 in order to qualify to bid at the sale; also there were 24,000 and odd shares offered by the Alien Property Custodian and 1,290 shares offered by Stoehr & Sons, Inc., at the same time, at the same sale. He then went on:

Q. Then there is a criticism on legal grounds that the bidders were confined to American citizens, and also criticism of the reservation of the right to reject bids. There appeared in the prospectus in which they advertised the sale a statement of the history of the Bot-

292 any Worsted Mills, and it concerns a statement of a report by Certified Public Accountants, and also a valuation of physical assets by independent engineers. Will you explain in your own way to the Court how and why these conditions were imposed and the reasons for accompanying these offers of sale by the reports of the accountants, and by the appraisement of engineers?

Mr. Marshall: That is objected to as immaterial and irrelevant. The documents are in evidence and show just exactly what transpired, and the propriety of the actions should be determined by the Court and not by any explanation that may be made with regard to the reasons, as stated by the witness.

The Court: Perhaps his purposes are not material, but certainly the circumstances which have justified those terms are material. I understand they are challenged?

Mr. Marshall: Yes, sir, they are challenged.

The Court: The challenge is arbitrary. If so, the circumstances which would justify the stand would certainly be proper in answer to that challenge. I will take that.

Mr. Bradley: We submit these conditions were imposed pursuant to advice of men of experience in the business world to secure a fair sale.

The Court: I will take it.

293 The Witness (resuming): Of course, as to the condition of the sale that the property would be sold only to American citizens that was in compliance with the terms of the Statute under which we sold it, the amendment to the trading with the enemy act giving the Alien Property Custodian the general power of sale of this enemy property and that expressly limited the sales to American citizens. The same answer may be made with reference to the condition of the sale permitting the rejection of bids under the Act, the President had the right to reject any or all bids, and of course, the Alien Property Custodian was acting in these matters under the delegated authority from the President of the United States.

As to the condition relative to the requirement of a certified check before the prospective bidder was permitted to examine the property, and another and larger check before he would be permitted to bid upon the property we found that condition necessary in all details, first to protect the properties from the run of casual businesses who had no idea of purchasing, who would want to scrutinize and inspect the plants and business while these advertisements were running. There did not seem to be any good reason why the general public should be invited in to examine these plants. It was not fair we thought to the purchaser, whoever he might be, that the competitors of the concern might have free access to the books and plants and business secrets, if you please, as might be developed by an examination of the plant. I speak generally and not with particular reference to this one case. It was, of course, a general rule, and was a condition of every sale that the Alien Property Custodian conducted. As it worked out, in practice, no good-faith, honest bidder was de-

terred from visiting the plants and making examination by reason of the fact that he had to put up a modest certified check, nor, 294 so far as our experience went, was any bidder deterred from bidding at the sale from reason of the fact that he had first to deposit a check before the bid. The amount——

Mr. Marshall: I move to have this latter statement stricken out as being a conclusion and not being any proof of circumstances.

The Court: It is a conclusion of the witness. He may state what basis he has for it, if he wishes that way.

Mr. Marshall: About the bidders being deterred from visiting the plant and being deterred from bidding at the sale.

The Court: Yes, I will strike that out.

The Witness (resuming): The bidders, themselves, told our Sales Department, and many of them told me that it was a splendid requirement for their protection.

Mr. Marshall: I request that that be stricken out. In this particular case the property has not been put up for sale.

The Court: The point is as to whether in the general practice as to which he states he adopted any fair basis, and I think that his experience removes the charge that this was an arbitrary and not reasonable provision. In other words, if you are certain an official had no basis, it is fair to say what, in prior instances had been the basis in the mind of the officials who are proposing it in this for making it a general rule, I will take it.

295 The Witness, resuming: We had what we call our sales organization in the Alien Property Custodian's office which was built up like this. A committee of leading men in the organization at Washington, consisting of five or six was known as the Washington Sales Committee. On that Committee the heads of the most important bureaus of the Alien Property Custodian served. They primarily considered whether the property should be sold, on what terms it should be sold, when, and so forth, and in general considered the advisability of a sale, and the character of the sale when made. If they passed it, it went to our Bureau of Sales, whose headquarters were in New York, where it was submitted to another Committee called an Advisory Sales Committee which was composed of five distinguished gentlemen who answered to my call to service in that regard, and served throughout my incumbency of the office. That committee consisted of Mr. Otto T. Bannard, Chairman of the Board of the New York Trust Company, Mr. Cleveland H. Dodge, Judge Ingraham, Ralph Stone, President of the Detroit Trust Company of Detroit, Michigan, and B. H. Griswold, junior head of the firm of Alexander Brown & Sons of Baltimore.

Those gentlemen were advisers and no sale was held except on terms and conditions approved by them and no sale was approved by the Alien Property Custodian except it was first approved both as to the character of the purchaser, and the adequacy of the price by this advisory sales committee. The advisory committee met

weekly during our busy selling season and devoted a great deal of time and attention to these matters of the terms of sales and the character of the purchasers and the adequacy of the price of all of these properties. So that the Alien Property Custodian in fixing the terms of these sales, and in making the sales, and in accepting the purchasers or in advising the President to reject bids, acted
 256 always upon the counsel and advice of these two committees, one of which was Governmental and the other was outside and purely advisory and the members of both of which were devoting a large part of their time and splendid talents to that aid to the Government. This sale, in its preparation and offer for sale went through the general process. After this property was advertised for sale, Mr. Louis Marshall conferred with me at Washington. As I recall our conversation touching the sale, Mr. Marshall came to me on behalf of Max Stocher and some associates, possibly, asking for an adjournment of the sale after the advertisement had been running some time, and he very vigorously urged that the sale should be adjourned in order that Mr. Stocher might complete the formation of a syndicate which he was working on to purchase the property. He said, if I would not agree to continue the sale, of course, they would go into court to restrain the sale, and allege the unconstitutionality of the law; that was before the institution of the suit after the sale had been advertised.

Cross-examination.

By Mr. Marshall:

The Witness (resuming): I think I nominated as the directors of Stocher & Sons, Incorporated, originally Mr. James N. Wallace, Francis P. Garvan and Andrew B. Duvall. I do not think I named Mr. Kieffer as another member of the Board of Trustees, I think when the vacancy occurred the Board elected him. I do not think I either approved or disapproved of his appointment. I do not think it came to me for any action. It may have been reported to me, and it was not disapproved. I think Paul Kieffer is an associate of Mr.

Quinn, I do not know him personally. Mr. Quinn was counsel for the Botany company and possibly for Stocher & Sons,
 257 I do not know; if he was counsel, the company designated him. He was elected by the directors of the Botany Worsted Mills and I think it possible that some of them conferred with me about it, discussed it with me. He was either suggested by me or they referred the subject to me and I approved of his appointment.

Mr. Duvall is a Washington lawyer. He was connected with the office of the Alien Property Custodian early in the work of the Alien Property Custodian, doing legal work in the department. He might have been such an attorney at the time he became a director of Stocher & Sons, Incorporated; he resigned about the time he became a director in these various companies. Whether he resigned before he was elected or after he was elected, I do not know. I think he became a trustee of both the Botany Worsted Mills and Stocher & Sons, Incorporated. He was in Mr. Brodhead's division.

Mr. Francis P. Garvan was connected with me in the office of the Alien Property Custodian; he was chief of the bureau of investigation and he was located in the New York office. He continued to be such chief until he became Alien Property Custodian as my successor. At the time he was designated a director of Stoehr & Sons, Incorporated, he was connected with my office as Alien Property Custodian. In connection with the adoption of these terms of sale of the stock of the Botany Worsted Mills, I signed the order of sale, and that meant I passed upon and approved of them, but they were submitted to me as the advice and counsel of the sales committees that I have described to you. I took this action and determined the time and place of sale and also the terms of sale by putting my signature to the order which had been prepared in the way I mentioned. I had nothing to do with the formulation of the order and did not fix the time or the place or anything of that sort. I did not think anything about the possibility of the Board of Trustees of Stoehr & Sons, Incorporated bringing an action on behalf of Stoehr & Sons, Incorporated to restrain me, as Alien Property Custodian, from — these 14,900 shares of the stock of the Botany Worsted Mills Company which had been seized by me. I would expect them to do so, if it were a proper exercise of business judgment with respect to the operation of the company. There was no reason why they should not attack my acts as Alien Property Custodian in disposing of this property; we did have boards of directors who did that, for instance, one was the Vogelstein Company. I cannot remember the name of the company. They did not bring a suit, but they passed a very vigorous resolution, and put it up to the Alien Property Custodian. There was no sale; it was not with respect to sale, but with respect to the action of the Alien Property Custodian in taking the property. I did not change the Board of Directors which I had originally nominated nor did I make such a change in that Board subsequent to these resolutions that I have referred to. I am pretty sure I did not—I nominated some nine or ten hundred men as directors of these corporations, and it is hard for me to remember. I am just saying that as illustrative of the independence of all these directors. If Mr. Duvall, Mr. Garvan or Mr. Kieffer thought it was not a proper thing for me to do, I could not have objected if they had brought an action to restrain me from selling these 14,900 shares of stock: I would have expected them to do it, if it was a proper exercise of their business judgment in the management of the corporation. It was their duty to protect their property and the rights of the property. What would have been proper for them to do with regard to the sale of the 14,900 shares of stock would have depended entirely upon the facts and the law as to ownership of the property. While Mr. Garvan for instance, was associated with me in my work, he was not appointed because he was a clerk in my office or anything of that sort, he was a so-called dollar a year man; his services were being given to the Government as part of the war work and he was working in many other relations than merely the Chief of the Bureau of Investigation in my office. We were relying upon him to

handle a great many business transactions. The fact that he was in my office did not mean I could control him any more than I could control Judge Ingraham, for instance, or Mr. Bradley. I made no written memorandum of an interview which I had with Mr. Marshall in Washington, which I spoke of before but I think I have stated it correctly. It took place while the advertisement was running and before the date of the sale. Mr. Marshall did not state in that interview that he could see no reason why there should be any sale of this stock at this time, and that he asked that the sale should go down; he asked that the sale should be postponed in order for Mr. Stocher to get his syndicate completed to become purchasers. I do not think there was a time mentioned—he just asked for a temporary postponement. He might have said in substance that he could see no reason for the sale, that there was nothing to be gained by the Government and that I, as Alien Property Custodian, had the custody and possession of these shares of stock and that the business was a business which was of such a character that

300 it would be a profitable business, and there was no occasion for the sale of these shares of stock; the part which was impressed most upon my mind, however, was the suggestion that the sale—or the request that the sale should be postponed until Mr. Stocher and his associates could get their syndicate together, and, very frankly, that was impressed upon my mind because it was a rather remarkable suggestion on Mr. Marshall's part, if that was not done, he would, of course, file a bill and attack the constitutionality of the law, and that seemed to be so inconsistent with forming a syndicate to become a purchaser at the sale, I could not forget it; that is what was impressed on my mind. I think Mr. Marshall did argue that the law under which we proposed to sell was unconstitutional or that that was what he would allege in your bill; I believe he did not contend that the act would be unconstitutional. I didn't make any written memorandum of the conversation or with respect to Mr. Marshall's statement about the formation of a syndicate by Mr. Max Stocher. I stated the substance of his conversation immediately to some of my associates in the office which further impressed it upon my mind. That is over a year ago.

It was stipulated between counsel for both parties that the defendant, A. Mitchell Palmer, was appointed Alien Property Custodian and duly qualified on October 22nd, 1917 and that he continued in that office until on or about March, 1919, when the defendant, Francis P. Garvan, was duly appointed Alien Property Custodian and qualified and has acted as such up to the present time and is now Alien Property Custodian.

Mr. Marshall: I think in the course of his testimony Mr. Palmer made the statement that he did certain things under delegation from the President. That is a conclusion, and I ask that that be stricken out. If there was such a delegation it must be in writing.

The Court: I think that is true, but I have no doubt there is a proclamation.

Mr. Marshall: I want that stricken out.

The Court: Very well.

Mr. Ingraham: We will produce the proclamation or the order of the President under which we acted.

HARRY P. BARRAND, a witness called in behalf of the defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Quinn:

I am a resident of New York and one of the Vice-Presidents of the National Bank of Commerce of New York. I have been connected with that bank for twelve years in the Foreign Department for that whole term with the exception of three years, from clerkship to assistant managership, assistant cashier and second vice-president. I am with that bank now. It is part of my duties in the Foreign Department, as one of the managers of it, to be familiar with and know the facilities of communication by cable and wireless and it was in 1914 with Europe and particularly with Germany. That was part of my function and business. The National Bank of Commerce did a large volume of business with German banks and institutions prior to the outbreak of the war, in August, 1914, and
302 subsequent to and down to the entry of the United States into the war on April 6, 1917. They had accounts with some of the largest banking institutions in Germany, with nearly all of them, and received and remitted money by cable transfers and by wireless. I think it was on August 5th, 1914 or thereabouts that Great Britain cut the cable wire to Germany which necessitated all their cable communications there going through Great Britain or France, and in going through Great Britain or France they had to be written in plain English or French and the full addresses of the addressee and the sender given and any other Government requirements complied with to show that they were not designed for Germans by the French and English Governments. That continued down to January 5, 1915. Codes were permitted to Great Britain and England but codes were not permitted — any other countries, only upon showing that the codes were for British subjects. Codes were allowed to France but only on the same conditions, only for use of French subjects and only sent in accepted codes of which the Governments and the Government censors had the keys. This cable condition continued down throughout the war and continues to date. Direct mail communications between this country and Germany were to go through up to the early part of 1915; indirect through neutral countries, they were going through to the latter part of 1916.

In answer to questions by the Court, the witness stated:

There were regular communications if the means of communication were established, for instance, if German subjects or German concerns had representatives in the Scandinavian countries and

303 could deceive the British censors, why communication did continue that way. It had to be surreptitious. These mails would go from Scandinavia generally by Scandinavian boats, although they are sometimes held at Kirkwall, and sometimes held at Halifax. It was a question of concealing the character of the communication. They were all opened either at Kirkwall or Halifax, whether they actually, physically did it, I do not know. This also applied to Scandinavian boats. Scandinavian mails to my recollection did not go out on British ships. Britain did not allow ships of the Scandinavian countries to come from England direct to this country, but one or two did. If they did, they escaped the cordon.

Mr. Vorhaus: I believe all mail carried on these ships was examined by the British, but they allowed it to pass through their hands.

The Court: So I understand the witness meant to say.

The witness then continued to answer questions of the Court, as follows:

That continued to the Fall, perhaps, of 1916. There was a large volume of mail coming in during the years 1915 and 1916, the Deutschland brought over some mail, too. And then there were Germans coming in under assumed names, and by various devices, were taking it to Germany and coming back, and there was considerable mail came through Switzerland as well. This came over in French ships and was also subject to censorship in France.

The witness, then, in answer to questions by Mr. Quinn, resumed:

304 I do not think the French censorship was so rigorous as the English. By the Deutschland, I mean the submarine "Deutschland," which made two trips and brought mail and took back mail on both trips.

In regard to the wireless, at the outbreak of the war there was the Sayville station which was in operation. The Tuckerton, at that time, was not completed. The Sayville continued throughout the war to send messages. I think it was taken by the Postal Cable Company which is controlled by the Commercial. The Tuckerton was not finished, and if I am not mistaken, there was some trouble as to deciding who were the owners of the Tuckerton station and the United States Government finally took it over, and the Western Union Telegraph Company continued to use it. One company had one wireless and the other the other; the Commercial Cable had the Sayville, and the Western Union had the Tuckerton. Messages by wireless to and from Germany, in the years 1915 and 1916 and to my knowledge down to April 6, 1917, were dispatched over the wireless route in very large volume. At one time they were limited to twenty-five words to a message, but that was on account of the very large number of messages sent through the stations. There was, during that whole period once in a while a delay, that is, the cable companies would become clogged through the great number of mes-

sages that they had, and had to postpone for maybe two or three days at a time, until they could catch up. Communication continued over the wireless to April 6, 1917, the date of America's entry into the war. These messages were sent from this country and received in Germany and received by wireless from Germany in this country and telegraphic transfers were made by wireless during that time of large volumes of money in January, February and March, 1917 and some banks even transmitted and received money by cable
 305 and wireless transfers right down to the eve of the war, April 6, 1917.

In answer to questions by the Court, the witness stated:

I would not say that the mail went freely right up to the end of 1916. At the beginning of 1916, I would say there was quite a volume of it coming through. Of course, it petered down toward the last Gerard notes, which were in the end of 1916. Britain and France, as far as they could, stopped communication by mail from Germany to this country in 1915,—I do not know exactly when in 1915—so that it was merely surreptitious communication that went on. That situation which was changed in 1915, continued down to April 6, 1917, down to the outbreak of the war. There was no free communication excepting what was put through surreptitiously. With respect to the wireless service, subject to the congestion of the great number of messages, there was free communication between Sayville and Tuckerton and the other side until April 6th, 1917,—I do not say but what there may have been April 5th, but there was communication with Germans freely throughout March, 1917, subject to the congestion. The communication was subject to the United States Government censorship; that is, they could not send a wireless saying that the steamship Mauretania was leaving the Port of New York, for instance. Business communications could be sent, and the Government censors had to be satisfied that it related to business, and not to an act of war in preserving the United States' neutrality.

In answer to a question by Mr. Vorhaus, the witness stated:

306 All messages which were sent over the wireless were censored by the cable authorities during 1916 and 1917.

Cross-examination.

By Mr. Vorhaus:

The Witness (resuming): After the severance of diplomatic relations, the censorship did not become very rigorous in regard to business communications. The purpose of that censorship was to preserve the neutrality of the United States. I do not see that the fact that any person having a German name or being suspected of representing German interests made any difference in the messages going to Germany. German names would naturally be in the wireless. I would not say that messages of people with German names or who

were suspected of having German affiliations in Germany were more rigorously censored ever though they related to business, which I know of my own knowledge, because of my experience with the Bank of Commerce. We had other messages besides the transmission of money to and from Germany. If we had purchased cable transfers from other institutions and they had not been received we would send a wireless there about them. They were received. These messages had reference principally to the transmission of money and making inquiries in case there was any delay, and that was the extent of my own experience.

Mr. Vorhaus: I move to strike out his testimony, if your Honor please, with regard to that experience.

The Court: I will take it as it stands.

In answer to questions by the Court, the witness replied:
307 We transmitted during the months of February and March, 1917, wireless transfers to Germany the same as we did before.

There may have been a difference,—I cannot recall what the delays were during that period but as far as the censors went I found no change. I know nothing beyond the transmission of moneys and the dispatches relative to its delay or to its receipt, and so on. There may have been other messages, but none that I recall.

Redirect examination.

Of Mr. Quinn:

The Witness (resuming): As one of the foreign exchange experts of the Bank of Commerce, I had conferences at that time with other men in regard to the transmission of moneys to Germany and it was part of my business to know the cable facilities and the customs of the companies represented by the men attending these conferences.

I was familiar with the activities of the other companies in
308 sending and receiving messages by wireless between this country and Germany in the year 1916 and in January, February and March of 1917 by other financial institutions.

By Mr. Quinn:

Q. Now, is it not a fact that the number of messages increased in January, February and March, if possible, over what they were before.

Mr. Vorhaus: I object to that.

The Court: I will overrule the objection.

The Witness (resuming): They did increase. In some of the companies, of course, they had a situation which they wanted to clear out of and consequently messages did increase.

Recross-examination.

By Mr. Vorhaus:

The Witness (resuming): After the severance of diplomatic relations and when the war was imminent, the banks wanted to clear up all the business they did with German banks, the messages increased and the companies were accepting them.

The Court: As to your motion to strike out everything except his knowledge——

Mr. Vorhaus: Well, I do not press it.

The Court: If you do not press it, I will not rule on it.

Mr. Vorhaus: I think your Honor limited it on your examination, but just what probative force you will give it——

303 The Court: I really do not think he has any knowledge except as to the transmission of money.

Mr. Vorhaus: I assume your Honor will only give the evidence the probative value which it deserves, so I do not think it is necessary to press the motion.

The Court: At present, I do not see how I can give it any effect.

Mr. Quinn: Then I will have to call some other witnesses from the telegraph company, I wanted to shorten it and Mr. Barrand has testified that he knew of the experience of the other banks. If your Honor says that at present you do not care to give it any value, we will call a witness, but it will prolong the trial. We will call the men and give the number of messages, and so forth.

The Court: I cannot judge except from the proof here. I do not think this witness really knew anything more than the transmission of money.

Mr. Quinn: He has testified that he knew of the volume of the messages sent by banks, and that they were being sent.

I will ask Mr. Barrand.

Upon being questioned by Mr. Quinn, the witness stated:

From communications had with other banks, the general nature of the messages and wireless messages received and sent by persons in this country or institutions for the Bank of Commerce to and from Germany was generally understood.

310 Mr. Vorhaus: I object to the witness making a statement of what was understood.

The Court: Yes; if he knew it from what they told him I would not take it.

By Mr. Quinn:

Q. Do you know the general business practice at that time, prevailing at the time, in January, February and March, 1917, acquired in the course of dealings with other banks?

Mr. Vorhaus: I object to that as incompetent. This subject matter is not a matter of any custom. Evidently it is hearsay.

In answer to questions by Mr. Quinn, the witness then resumed:

It was just talking together with one another; what they said they could get through. I have communicated with, to refresh my memory on this thing, with both the Western Union and the Commercial Cable Company within the last two weeks. I did not just specially refer to financial wireless messages; they informed me that they were receiving all kinds of communications right up to that time.

The Court: Is there really an issue about this?

Mr. Vorhaus: If your Honor please, I do not see why this testimony is received. I do not know who told him or who the party is who told him.

By Mr. Quinn:

Q. Say who told you.

A. Mr. Messner.

311 The Court: Do you raise an issue on it?

Mr. Vorhaus: I certainly do.

The Court: Objection sustained. You will have to call the men.

Mr. Quinn: That will prolong the trial.

The Court: It is clearly hearsay evidence. I cannot let it in.

Whereupon, Mr. Quinn, as counsel for the defendants, then offered in evidence a letter dated February 5, 1918, which was conceded by the plaintiff to have come from the files of Heyn & Covington, and that it was signed by Hans E. Stoehr and was received by Mr. Heyn to whom it was addressed. It was marked defendant's Exhibit X.

KARL ZIMMERMAN, recalled, testified as follows:

Direct examination.

By Mr. Quinn:

I prepared from the books of the Botany Worsted Mills a statement of the votes cast at the stockholders' meetings, as shown by the minutes from March 15, 1910, to May 28, 1919 and this statement (examining same) is a correct statement from the books.

Whereupon, Mr. Quinn, as counsel for the defendants, offered it in evidence and it was received in evidence and marked Defendants' Exhibit Y.

The Witness (resuming): I acted as Judge of Elections at the Stockholders' meetings of the Botany but did not pass upon the

proxies submitted; I think the attorney for the company used to pass on all proxies.

312 By Mr. Quinn:

Q. When Hans E. Stoehr voted his proxy for Kammgarn-Spinnerei, he had a written proxy from Kammgarn-Spinnerei, had he not?

Mr. Vorhaus: I object on the ground that the proxy is the best evidence.

The Court: Yes, it is better.

The Witness (resuming): He must have had one. I was the Judge. When Hans E. Stoehr voted as proxy for Kammgarn Spinnerei for 14,910 shares that was a written proxy and I hunted for it.

By Mr. Quinn:

Q. And take the meeting of March 17, 1914, when Hans E. Stoehr voted as proxy again for Kammgarn-Spinnerei Stoehr & Company on 14,900 shares; he had a written proxy?

A. I will have to look those proxies up.

Mr. Vorhaus: I object to that, if your Honor please. It is clearly hearsay.

Objection overruled.

The Witness (resuming): I looked for the proxies, but I have not compared them; they were packed up in packages and the date on it, but I did not look at the different proxies.

Mr. Vorhaus: I move to strike out his testimony.

The Court: Do you want the proxies?

Mr. Vorhaus: I do.

313 The Court: You will have to bring them.

The Witness (resuming): I think I can go out to Passaic and get the proxies today; it depends how the trains are running there. Since the hearing Wednesday, I examined the office files of the Botany for correspondence between Kammgarnspinnerei of Leipzig and Botany from the year 1913 up to date, that is, to 1916, the last communication between the Kammgarn-Spinnerei of Leipzig and Botany and approximately 100 to 150 letters addressed to Botany Worsted Mills were received by the Botany in that time. They were signed Kammgarn-Spinnerei.

Mr. Vorhaus: I object to that as immaterial and incompetent. Objection overruled.

The Witness (resuming): They were signed Kammgarn-Spinnerei Stoehr & Company Aktiengesellschaft, and then were either signed by the two procurists or one procuristen and one managing director, or were signed by two managing directors. They were all addressed to the Botany Worsted Mills and the same is true of the

ten or a dozen letters which passed between Kammgarn Spinnerei and the Botany; relating to the dividends of stock.

Mr. Vorhaus: I object to that as incompetent.
Objection overruled.

By Mr. Vorhaus:

The Witness (resuming): According to defendants' Exhibit Y, at the annual meeting of March 16, 1915, Hans E. Stoehr as trustee voted 10,000 shares, that is 10,000 of that 14,900. It states therein that "Kammgarn-Spinnerei Aktiengesellschaft represented by
314 Georg Stoehr voted in person, 4,910 shares," which is correct.

That was on account of the twenty day rule that the stock had not been formerly transferred to Max. At the annual meeting of March 21, 1916, the 14,900 shares were voted in this way: 10,000 by Hans E. Stoehr as trustee, and 4,900 voted by Max W. Stoehr as trustee.

FERDINAND KUHN, a witness called in behalf of the defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Quinn:

I am a citizen of the United States since the year 1908 and live in Passaic, New Jersey, with my family. I was connected with the Botany Worsted Mills since 1890, first as wool buyer until 1903 and then director of the mill from the year 1900 to date. In 1904 I became Treasurer and continued to act as such until March 15, 1915, when Hans E. Stoehr was elected Treasurer. I became Vice President in March, 1915 and on the death of Hans E. Stoehr in 1918, I became active again in directing the affairs of the Company and continued so until the new Board came in. On the resignation of Mr. Prehn, I was elected by the new Board as Vice President August 20, 1918. I am now President of the Company, being elected as such at the Directors' meeting of the present Board March 27, 1919. I was treasurer of the company in 1913 and 1914 and attended the stockholders' meetings.

By Mr. Quinn:

Q. What is your best recollection regarding a proxy from Kammgarn-Spinnerei Stoehr & Company?

315 Mr. Vorhaus: I object to that as incompetent and immaterial.

Objection overruled.

A. The proxies must have been there if Hans——

By the Court:

Q. You do not remember anything about it?

A. I do not remember; the votes were very carefully examined.

Mr. Vorhaus: I ask to strike that out.

By Mr. Quinn:

Q. In the course of his direct examination, page 45 of the stenographers' minutes, Mr. Max W. Stoehr testified that "It was the rule that when my father was over here he represented the firm, and when he was not here at the stockholders' meetings, then my brother represented the firm." Please state the facts in regard to that.

Mr. Vorhaus: I object to that question.
Objection overruled.

The Witness (resuming): When Eduard Stoehr was here he represented the firm and voted in person as a director, an active director of Kammgarn-Spinnerei Stoehr & Company. Hans E. Stoehr was not a director, he was a member; he was not an active director of Kammgarn-Spinnerei; he was not a director at all; I mean in what we call in the Kammgarn-Spinnerei is a director. There are two official directors.

By Mr. Quinn:

Q. He never was either?

Mr. Vorhaus: I object to that.

The Court: There is no contradiction. It is exactly what your client has said.

316 The Witness (resuming): He was a member of the Aufsichtsrat; that was all, as far as I know here.

Q. On pages 44 and 45 of the testimony of Mr. Max W. Stoehr, on direct examination he testified that the Kammgarnspinnerei negotiated certain sales to the Botany Worsted Mills through Hans E. Stoehr, and that where there was a sale to the Botany, "all its affairs were directed by Hans E. Stoehr," and that "Hans E. Stoehr acted for both." Will you state what the facts in that regard were to your own knowledge?

A. I think those transactions were directly from the Kammgarn-Spinnerei with the Botany Worsted Mills.

Mr. Vorhaus: I move to strike out the answer; he said he thinks they were.

By the Court:

Q. Do you know anything about it?

A. No; the transactions were between the Kammgarn-Spinnerei Stoehr & Company and Botany Worsted Mills.

The Witness (resuming): Those transactions in the years 1913 and 1914 up to March, 1915, were directly, were signed by the proper officers on both sides either from Leipzig or in Botany. I was the treasurer of the company in 1913 and 1914 and the chief executive of the company in that capacity and had charge of the transactions above referred to; I remember the sale of yarns. There was a great deal done in 1914 from January until the outbreak of the war in Europe; I think it was mostly yarns; there may have been a few goods. I had entire charge for the Botany Mills of those transactions; I was the treasurer responsible for it. It might be that certain letters were signed by somebody else at the mill of the Botany going to Kammgarn-Spinnerei, but they were signed by some officer of the Botany; as in the capacity of an officer of the Botany.

317 I am not sure about every letter, every transaction, it might have been done by some other officials.

By Mr. Quinn:

In the course of his direct examination, page 46 of the stenographer's minutes, Mr. Max W. Stochr testified relating to the transactions with Kammgarn-Stochr & Company as follows:

Q. "Your brother Hans wrote for the Botany Mills for the Kammgarn Spinnerei, and they answered him?"

A. Yes."

And on page 47 he was asked and answered thus:

"Q. You think the Botany Mills for the most part acted, if I may say so, as selling agent?"

A. Yes.

Q. What particular officer of Botany Worsted Mills conducted those negotiations?"

A. Hans Stochr."

Please state the facts of your own knowledge in regard to those transactions.

Mr. Vorhaus: I object to that.

Objection overruled.

The Witness: I think those yarn transactions in 1914, from January to the outbreak of the war in Europe, were greatly transacted by Mr. Hans E. Stochr in the capacity as an official of the Botany Worsted Company.

Mr. Vorhaus: I move to strike out the words "in the capacity of."
The Court: Strike it out.

By Mr. Quinn:

Q. Did the communications from Kammgarn-Spinnerei to Botany regarding those yarn transactions come from Kammgarn Spinnerei direct to the Botany.

A. Yes.

Mr. Vorhaus: I object to that. That is calling for a conclusion.

318 By the Court: If you want the correspondence you are entitled to have it. Is that what you want?

Mr. Vorhaus: No.

Objection overruled.

The Witness (resuming): They came from Kammgarn-Spinnerei and the answers that went from the Botany, went direct from the Botany to the Kammgarn-Spinnerei.

Same objection and ruling.

Mr. Quinn:

Q. In the course of his direct examination, referring to those yarn transactions, Mr. Max W. Stocher stated that in said transactions his brother Hans E. Stocher "acted for both"; is that the fact?

Mr. Vorhaus: I move to strike that out.

Motion denied.

The Witness (resuming): He acted for the Botany, as an official for the Botany. Georg Stocher was not in the United States in February, 1917.

By Mr. Quinn:

Q. Was any certificate received by the Botany Worsted Mills from either Eduard Stocher or Georg Stocher relating to the 14,000 shares in January, February or March, 1917?

Mr. Vorhaus: I object to that, if your Honor please.

Objection overruled.

The Witness (resuming): No, and Eduard and Georg Stocher were the only two directors of the Botany at that time in Germany.
319 I visited Germany during the years that I occupied the position of treasurer of Botany Worsted Mills; in the years 1905, 1906, 1908, 1910, 1912 and December, 1913 and January, 1914. And as the treasurer of Botany Worsted Mills I had official transactions with Kammgarn Spinnerei Stocher & Company and I visited the officials of that Company in Leipzig; its share capital was 12,000,000 marks. I was acquainted with Eduard Stocher, the father and Georg Stocher, the son and with George Kuntz. I have attended meetings of the Aufsichtsrat, the Advisory Board as an invited guest.

When asked by the Court "You do not know how the powers of the corporation were distributed, do you," the witness replied:

Not exactly how the powers were distributed, but I know the business was managed or conducted by two active managers or directors, and the Aufsichtsrat, corresponding to our Board of Directors.

220 Cross-examination.

By Mr. Vorhaus:

The Witness (resuming): Up to the outbreak of the European war there were very large dealings in yarns, that is, the Kammgarn-Spinnerei sent over a great many yarns, part of which were sold to the Botany Worsted Mills and another part disposed of to outsiders. The Botany Mill bought them from Leipzig and received them from there. Some of those yarns were disposed of to outsiders.

Q. And negotiations for those transactions were handled by Mr. Hans E. Stocher, those yarn transactions?

A. They were sold—

Q. They were handled personally by Mr. Stocher? I am not asking in what capacity, but Mr. Hans E. Stocher handled those transactions?

A. No. I think I handled those transactions. I did not go out as treasurer and sell the goods; our yarn representative sold them. The Botany bought those yarns from Stocher & Company.

In answer to a question by the Court, the witness stated:

I am not quite sure whether some transactions were direct from the Kammgarn-Spinnerei to a customer here, or whether they all were through Botany Mills. I was under the impression that they went all through Botany.

By Mr. Vorhaus:

Q. You know that a great many letters came from Kammgarn-Spinnerei to Hans personally?

Mr. Quinn: I object to that as incompetent, immaterial and irrelevant.

321 The Witness: That may be that he received direct letters from the Kammgarn-Spinnerei.

Mr. Quinn: I move to strike out the answer.

The Court: I will take it that he does not know.

The Witness (resuming): I only received the communications that came to the Botany Worsted Mills, or intended for the Botany Worsted Mills.

End of examination — Ferdinand Kuhn.

Whereupon, Mr. Quinn, as counsel for the defendants, offered in evidence two certain declarations of trust and a certain stock power executed by Max W. Stocher, each dated February 19, 1917, which were accepted over the objection of Mr. Vorhaus and marked Defendants' Exhibit Z.

Whereupon, Mr. Quinn, as counsel for the defendants, further

offered in evidence a copy of the By-laws of the Botany Worsted Mills adopted July 30, 1918, which was accepted by the Court over the objection of Mr. Vorhaus and marked Defendants' Exhibit A-1.

Whereupon, Mr. Quinn, as counsel for the defendants, offered in evidence from the minute books of Stoeck & Sons, Incorporated, the waiver by directors of notice of meetings of Stoeck & Sons and the minutes of the meeting of June 1, 1917, which was received in evidence and marked defendants' Exhibit B-1.

Whereupon, Mr. Quinn, as counsel for the defendants, offered in evidence from the minutes of the Board of Directors of Stoeck & Sons,

Incorporated, held March 28, 1919, the following two items:

Item No. 9. "Demand by Alien Property Custodian for rights, privileges and benefits of Kamagarn-Spinnerei, Stoeck & Company under the contract between it and Stoeck & Sons, Incorporated, dated February 20, 1917."

Also Item No. 10, entitled "Demand served upon the company by Alien Property Custodian on March 13, 1919."

The Court accepted pages 10, 11, 12, 13, and 14 over Mr. Vorhaus' objection, and they were marked Defendants' Exhibit C-1.

Whereupon, Mr. Quinn, as counsel for the defendants, further offered in evidence a copy of a demand dated the 10th of February, 1919, by the Alien Property Custodian upon the Botany Worsted Mills, acknowledged by William J. Hellmer with an acknowledgment on the back of it of service, which was received in evidence and marked Defendants' Exhibit D-1.

A colloquy then ensued between Court and Counsel on both sides as to the right of plaintiff to challenge the validity of the demand which was offered in evidence and marked Exhibit D-1, and to file a supplemental bill, the Court stating that there would be no difficulty whatsoever in the matter.

Whereupon Mr. Quinn, as counsel for the defendants, offered in evidence copies of two demands by the Alien Property Custodian upon Stoeck & Sons, Incorporated, dated August 6, 1918, one entitled "Report No. 4,845," in respect of the stockholdings of Eduard Stoeck, and the other, No. 4,845, in respect of the stockholdings of George Stoeck in Stoeck & Sons, Incorporated, which are produced from the files of Stoeck & Sons, Incorporated. These were received in evidence and marked Defendants' Exhibit E-1 and F-1.

323 Whereupon, Mr. Quinn, as counsel for the defendants, offered in evidence a certain demand by the Alien Property Custodian, dated March 6, 1918, addressed to Max W. Stoeck, in respect of the properties therein referred to of Eduard Stoeck, said demand being 1,264, which was received in evidence and marked Defendants' Exhibit G-1, and a demand by the Alien Property Custodian, dated March 4, 1918, addressed to Max W. Stoeck, in respect to the property of Georg Stoeck, also produced from the files of Stoeck & Sons, Incorporated, which was received in evidence and marked Defendants' Exhibit H-1.

It was thereupon stipulated by both sides that the above demands—the two demands which have been offered in evidence made upon the Botany Worsted Mills, and the two demands made upon Max W. Stocher that have just been offered in evidence—were properly served upon the persons to whom they are directed.

Whereupon, Mr. Quinn, as counsel for the defendants, offered in evidence from the files of Stocher & Sons, Incorporated, the demand by Francis P. Garvan, Alien Property Custodian, dated March 5, 1919, addressed to Stocher & Sons, Incorporated, and also to Max W. Stocher as trustee and individually, in respect to the stock of Eduard Stocher and George Stocher in Stocher & Sons, Incorporated, together with the annexed affidavit by Paul Kieffer, sworn to March 28, 1919, of the service thereof upon Max W. Stocher as trustee and individually, with the same stipulation as aforementioned, which was marked Defendants' Exhibit I-1.

Whereupon, Mr. Quinn, as counsel for the defendants, offered in evidence a demand by the Alien Property Custodian of the United States, by Francis P. Garvan, dated March 10, 1919, produced from the files of Stocher & Sons, Incorporated, addressed to Mr. Max W. Stocher as voting trustee and as trustee and individually, this copy having been served upon Stocher & Sons, Incorporated, together with the affidavit of Paul Kieffer, sworn to March 28, 1919, of the service of the same upon Max W. Stocher as voting trustee and as trustee and individually, which was marked Defendants' Exhibit J-1, with the same stipulation.

Whereupon, Mr. Quinn, as counsel for the defendants, further offered in evidence a certain demand by Francis P. Garvan, Alien Property Custodian, dated March 10, 1919 and addressed to Max W. Stocher and Lotte Stocher, executrix of the estate of Hans F. Stocher, in respect of the partnership interests in the firm of Stocher & Sons, of Eduard Stocher and Georg Stocher, Eduard 42-36ths and George 5-56th, which was marked Defendants' Exhibit K-1.

Whereupon, Mr. Quinn, as counsel for the defendants, further offered in evidence a certain demand by A. Mitchell Palmer, as Alien Property Custodian dated February 6, 1918, and addressed to Stocher & Sons, Incorporated in respect of the interests of the Kammergarn-Spinnerei & Company, as set forth in said demand, together with Exhibit A annexed thereto, which is a copy of the contract of February 20, 1917, which was marked Defendants' Exhibit L-1.

LOUIS HESSE, a witness called in behalf of the defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Quinn:

I am a public accountant by profession and have been so for upwards of twenty years. I am married and reside at Elizabeth, New Jersey. I was elected treasurer of Stocher & Sons, Incorporated, April 30, 1918, and gave the bond and qualified and have acted since and am now treasurer of said company.

325 Whereupon, Mr. Quinn, as counsel for the defendants, offered in evidence a statement prepared by Mr. Hesse from the books of the Company of Stoehr & Sons, Incorporated, of the stockholders meetings and the elections and resignations of directors from January 4, 1918, down to date, which was received in evidence and marked Defendants' Exhibit M-1.

The Witness (resuming): I prepared this from the Minute Book. I have charge of the books and records, the financial books and records of securities of Stoehr & Sons, and the correspondence relating to it and I prepared the annual statements of the company and the monthly statements of the operations of the company, the tax reports, State and Federal, and the statement of the current assets and liabilities in column form as of these periods, referring to plaintiff's Exhibit 13, from the books of the Company. In the statement, plaintiff's Exhibit 13, certain items have been entered as "doubtful", and so forth; I prepared a statement by dates, the dates corresponding to the seven columns, of the facts upon which such securities were entered as doubtful and those refer to the seven dates at the top of the seven columns, and that was prepared from the books of the company. There is nothing in the records of Stoehr & Sons, Incorporated, purporting to be a certificate representing 14,900 shares of stock of the Botany Worsted Mills.

By Mr. Quinn:

Q. Is there anything in the files of Stoehr & Sons, Incorporated, purporting to be a communication to Kammgarn Spinnerei Stoehr & Company in regard to 14,900 shares of stock of the Botany Worsted Mills?

326 Mr. Vorhaus: I object to that as incompetent.

Objection overruled.

The Witness (resuming): I have searched the files of the corporation of Stoehr & Sons, Incorporated, and I fail to find any such communication.

By Mr. Quinn: Is there in the files of Stoehr & Sons, Incorporated, any communication from Kammgarn-Spinnerei Stoehr & Company in either January, or February or March, of 1917, to the Company?

Same objection, ruling and exception.

The Witness (resuming): No. As far as I know when Stoehr & Company, Incorporated, took over the assets of Stoehr & Sons, the partnership, it took over the records of the partnership and the books and records of the partnership have been in my possession since that time; those that are not are in Mr. Quinn's office under receipt to me as treasurer. I have searched the records of the partnership of Stoehr & Sons for any communication to either Eduard Stoehr or George Stoehr regarding the assets of the partnership, Stoehr & Sons, or of the transfer to Stoehr & Sons, Incorporated, but have found no such communication or notice. I have searched the

records of Stoehr & Sons, Incorporated or of Stoehr & Sons, the partnership, but have failed to find any letter or wireless message from the partnership to Eduard and George Stoehr, or either of them, or from Mr. Hans E. Stoehr, or Max W. Stoehr to either Eduard or Georg Stoehr, nor any such communication from Stoehr & Sons,

327 Incorporated, or any officer of Stoehr & Sons, Incorporated, to Eduard or Georg Stoehr; nor any request or demand made by Mr. Max W. Stoehr or any one on his behalf upon Stoehr & Sons, Incorporated, or any of its officers and directors, to take any action respecting the 14,900 shares of stock of the Botany Worsted Mills prior to the commencement of this suit on or about December 2, 1918.

Mr. Vorhaus: I object to that. We allege affirmatively in our complaint we did not make a demand because the directors were Mr. Palmer's nominees.

Mr. Quinn: I think Mr. Vorhaus is mistaken. They do not allege affirmatively.

Objection overruled.

The Witness (resuming): I have searched the files of Stoehr & Sons, Incorporated for any communication from Kammgarn Spinnerei regarding a contract of February 20, 1917 but have found no such communication from Kammgarn-Spinnerei to Stoehr & Sons, Incorporated or to any of its officers; the same thing applies to the partnership, the partnership records of Stoehr & Sons; I have searched the record also. I attended all of the meetings of the Board of Directors of Stoehr & Sons, excepting one. I was present at all meetings before Mr. Max Stoehr's resignation was accepted. During the time that Mr. Max W. Stoehr was a director of Stoehr & Sons he made no statement to my recollection to the Board as to a contract of February 20, 1917, nor did he make any communication to the Board about it by letter or otherwise, as far as I know.

328 By Mr. Quinn:

Q. Did he ever claim the shares referred to in a certain contract of February 20, 1917, being 14,900 shares of Botany Worsted Mills?

Mr. Vorhaus: I object to that.

Objection overruled.

Q. Did Mr. Max W. Stoehr ever bring up or make any statement or suggestion regarding paying anything under the contract of February 20, 1917?

Mr. Vorhaus: I object to that, because the minutes of February 20 show the contract was made.

Mr. Quinn: I am talking about the period when Mr. Heese was in.

Mr. Vorhaus: When did he come in?

The Witness: April 30, 1918.

Q. Was that contract mentioned in any of the directors' meetings until Mr. Stoehr went out?

A. Yes, it was referred to in one meeting, on August 30, 1918.

The Witness (continuing): The minutes state I presented the report of Perley, Morse & Company, who were the accountants who were making an examination of the books of Stoehr & Sons, in order to ascertain its financial condition. At that meeting I presented the report of Perley, Morse & Company, and I pointed out to Mr. Wallace the item of \$5,000 on the balance sheet, which was marked, "Investment 14,900 shares, Botany Worsted Mills Stock", and Mr. Wallace then asked Mr. Quinn some questions in regard to that contract.

By Mr. Quinn:

Q. What was said, what also?

Mr. Vorhaus: We object to what Mr. Quinn and Mr. Wallace said.

Mr. Quinn: Mr. Wallace was president of the Company and Chairman of the Board.

The Witness: Mr. Wallace was inquiring about this contract and the item of \$5,000.

Mr. Vorhaus: Does your Honor allow the conversation between Mr. Quinn and Mr. Wallace if Max Stoehr was not present?

329 Q. Was Mr. Max Stoehr present?

A. He was.

The Court: I will allow it.

The Witness (resuming): Mr. Quinn went into an explanation of the object of the Trading with the Enemy Act and explained to the Board; the Board were all present—explained to the Board that this contract was a palpable attempt on the part of Stoehr & Sons, Incorporated, to lodge the ownership of these 14,900 shares of stock under an American corporation under a contract which could not be carried out, and which would not hold water, and then Mr. Quinn said to Mr. Wallace that he would make a formal report on that subject at the next meeting of the Board and Mr. Quinn did report at the following meeting.

Mr. Vorhaus: I move to strike out all that testimony; after all it is merely an opinion of Mr. Quinn. I do not see that it has an evidential value at all.

The Court: Yes, it has, if Max was there; if he was a party to the contract, any action he might have taken on it, or his inaction.

In answer to questions by the Court, the witness stated:

Mr. Stoehr was present but did not say anything to my recollection.

The Court: I will deny the motion.

Mr. Quinn: I offer in evidence the following extract from the minutes of an adjourned regular meeting of the directors of
330 Stoechr & Sons, Incorporated, held Wednesday, October 16, 1918:

"Present: James N. Wallace, Francis P. Garvan, Andrew B. Duvall."

"Absent: Max W. Stoechr."

Item No. 12 is the following:

"Botany Worsted Mills stock purchased in Leipzig.

"Mr. Quinn reported that an alleged——"

Mr. Vorhaus: I object to that.

Objection overruled.

Mr. Quinn: "Mr. Quinn reported that an alleged agreement was entered into between Stoechr & Sons, Incorporated, and Stoechr & Company of Leipzig, for the purchase by the New York Company of 14,900 shares of Botany Worsted Mills Stock held by Stoechr & Company, of Leipzig."

The Witness (resuming): I remember the report by counsel to the directors of that meeting of October 16, 1918.

By Mr. Quinn:

Q. Please state the purport of it.

Mr. Vorhaus: I object to that; if the report is here it should be produced.

The Court: Was there a written report?

Mr. Quinn: No, it was not a written report.

The Witness (resuming): The substance of the report was practically confirming the opinion that Mr. Quinn gave the directors at the previous meeting of August 30, 1918, to the effect that the contract was entered into for the purpose of lodging this stock, which was foreign owned, and the certificates were not even in this country, in an American corporation for the purpose of beating the Alien Enemy Act. That was the substance of the report. Another
331 ground was that the company was not in a position financially to carry out the terms of the agreement. I do not recall any other grounds at the moment.

By Mr. Quinn:

Q. Do you recall anything being said about the parties never intending to do what the contract upon its face purported to do?

Mr. Vorhaus: We object to that.

Q. And all the circumstances which counsel explained?

Mr. Marshall: The minutes show anything on that subject; they are apparently complete.

Mr. Quinn: This reads,

The Court: Of course, that is not conclusive, whatever opinion into between Stoehr & Sons, Incorporated, and Stoehr & Company, of Leipzig, for the purchase by the New York Company of 14,900 shares of Botany Worsted Mills stock held by Stoehr & Company of Leipzig."

The Court: Of course, that is not conclusive, whatever opinion he gave them.

Mr. Vorhaus: It does not show any action was taken, if your Honor please.

The Court: Perhaps not. Inaction may be enough. I will take what they heard from their counsel, any opinion they acted on.

The Witness (resuming): I have already stated what Mr. Quinn said as far as I can recall. I remember distinctly Mr. Quinn saying that the contract, explaining the acts that were done, the different things that were purported to be done, and all the circumstances of it, and stating that he had come to the conclusion, and so advised the Board, that that did not represent the real intention of the parties.

332 By Mr. Quinn:

Q. And finally, do you remember whether Mr. Quinn advised the Board of Directors at that meeting, that if there ever was a contract of that kind it was abrogated, and made null and void on the opening of the war?

Mr. Marshall: I object to that; it is a statement of counsel?

The Court: It was somewhat leading, but he has exhausted the witness' memory before. I think you could have put it in a little less leading way than that.

In answer to questions by the Court, the witness stated:

I remember him saying that the contract did not represent the true intent of the parties, but that is not suggestive of anything more to me, excepting that he brought out the fact that the company was not in a financial condition to carry out the terms of the contract.

The Witness (resuming): I have searched the files of Stoehr & Sons, Incorporated, and I failed to find any letters or correspondence relating to the issuing of certain debentures of Stoehr & Sons, Incorporated, for credit balances.

Mr. Quinn: I now read in evidence the fact that the following debentures were issued for the following amounts:

Debentures were issued according to the books of Stoehr & Sons,

Incorporated, for credit balances to the following persons and in the following amounts:

"Kammgarn-Spinnerei Stoechr & Company.....	775,000
Eduard Stoechr.....	152,000
Georg Stoechr.....	24,000

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Max W. Stoechr.....	2,000
Hans E. Stoechr.....	47,000
	<hr/>
	\$1,000,000

The Witness (resuming): I have not been able to find any correspondence or any record in the books of Stoechr & Sons, Inc. showing any notice to or from either Kammgarn-Spinnerei Stoechr & Co. or Eduard or George Stoechr, regarding the issuance of those debentures or the credit balances.

By Mr. Quinn:

Q. Were the \$775,000 debentures ever delivered to Kammgarn-Spinnerei & Company?

Mr. Vorhaus: I object to that; there could not be. The law prevented it.

The Court: It will not do any harm.

The Witness (resuming): No; they were never delivered. They were subsequently seized by the Alien Property Custodian and turned over to the Guaranty Trust Company, as depository, and the \$152,000 debentures of Eduard Stoechr were found over in a safe deposit box in Passaic, but the same thing is true of them, and the same thing is true regarding the \$24,000 debentures of George Stoechr.

By Mr. Bradley:

The Witness (resuming): Let me explain that the books show 6,090 shares. There are 400 shares of the Botany stock that have never been located up to the present time. They are supposed to be in Germany, and the understanding is that those 400 shares are part of 1,200 shares that were purchased by three different individuals—I do not know the details of that transaction, because it all took place before I came into the company. 6,090
334 shares altogether are carried on its books at \$975,857.00 for the two. The certificates are about \$160 a share.

By Mr. Vorhaus:

The Witness (resuming): That was at the date the books were opened. The books were actually opened on March 1, 1917, but

some of these entries are dated in the journal as of February 20, 1917, the date when this original contract was signed.

By Mr. Bradley:

The Witness (resuming): There were not in the possession of Stoehr & Sons, Incorporated, certificates for more than 1,290 shares; that was the total.

Mr. Vorhaus: May we get a concession from the other side with regard to any official action that was ever taken by the Board so far as the minutes show, rescinding the contract?

The Court: Did the Board ever take any official action?

Mr. Quinn: No official action.

The Court: Yes, that may be entered.

(No cross-examination.)

ISAAC SMITH, a witness called in behalf of the defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Quinn:

I am connected with the Postal Telegraph Company and was so connected during the war as Superintendent of tariffs. I
335 have come here under a blanket subpoena. I do not know what I am to testify to. My company used the wireless station at Sayville. In the months of November and December of 1916, and January, February and March of 1917 messages were accepted at our office in the United States, transferred to the Atlantic Communication Company, Sayville, and then transferred by wireless to Nauen, Germany.

In answer to questions by the Court, the witness stated:

I cannot say unless I could compare dates whether that was only until the outbreak of war but I think it was just prior to the war. I remember the war broke out on April 6th. I would not like to say until April 1st; it would all be a matter of memory.

By Mr. Quinn:

The Witness (resuming): It is my best recollection that messages were received right up to the eve of the war and sent from this country to Germany by wireless, and received from Germany in this country by wireless right up to the outbreak of the war; those were commercial messages. We took all kinds of messages. There was no difference, as far as I know, between financial messages and messages of other kinds, so far as their being received and sent. In regard to code messages, I presume they were in the same class with the other messages, to the best of my knowledge. You see, a

great many things have happened to telegraph and cable companies during the war. There was no discrimination because the name of the person sending was a German, nor was *their* any discrimination because it was going to Germany and was signed by a German here.

336 Cross-examination.

By Mr. Vorhaus:

The Witness (resuming): A great many of those messages were subject to the censorship by the United States Government. I do not know what class of messages were permitted and what class were not. The censor representing the United States Government may have refused to pass code messages, but I do not know. I have no knowledge of any individuals who sent messages in February and March of 1917, to Germany, that were passed by the censor, outside of wireless messages sent by well-known banks throughout the country.

Redirect examination.

By Mr. Quinn:

The Witness (resuming): For some months prior to the entry of the United States into the war, April 6, 1917, there were some messages that were sent and were required by the Government officials to be sent in plain English and not in code.

It was then stipulated by counsel for both sides that the other companies would testify to the same general effect as above and that other witnesses from the Western Union, operating the Tuckerton Wireless Station, would testify to the same general effect.

WILLIAM J. HELLMER, a witness called in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Quinn:

The 14,900 shares of stock of the Botany Worsted Mills were on April 22, 1918, transferred into the name of the People's Bank & Trust Company as a depository and the entry is as follows:

337 "Transferred to People's Bank & Trust Company as depository for Alien Property Custodian, Passaic, New Jersey, April 22, 1918.

(Signed)

W. J. HELLMER,

Assistant Treasurer."

There was a subsequent transfer of that stock. The stock ledger of the Botany Worsted Mills shows that on February 25, 1919, 14,900 shares of stock of the Botany Worsted Mills was transferred

into the name of the Alien Property Custodian, and the total is by one certificate, said certificate being No. 81, and dated February 25, 1919; that was done after and pursuant to the demand of the Alien Property Custodian on the Botany Worsted Mills, dated February 11, 1919.

In answer to a question by the Court, the witness stated:

At that time we had begun to keep the transfers in the American way.

Mr. Vorhaus: We have not objected to any of this testimony on the assumption that we do not lose our right to question its validity at the end.

The Court: Oh, no; that is the issue in the case.

The Witness (resuming): I have been assistant treasurer of the Botany Worsted Mills since April 2, 1918 and Secretary of the Botany Worsted Mills since November 1, 1918, and a member of the Board of Directors since November 1, 1918. I was not in the employ of the Company prior to April 2, 1918. I am an accountant by profession and was elected assistant treasurer and secretary following the reorganization of the Board in March, 1918. Max W. 338 Stochr made no demand or request to my knowledge upon the Botany Worsted Company or any of its officers since the time I have been secretary and treasurer of the company for any specific act or anything regarding the management of the company.

Mr. Vorhaus: I object to that as immaterial. We did not give any testimony that he had made any demand.

Objection overruled.

(No cross-examination.)

JUSTUS SHEFFIELD, a witness called in behalf of the defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Quinn:

I am an attorney and counsellor at law and a member of the New York Bar. I was formerly associated with Mr. Quinn in the practice of law at 31 Nassau Street and since July, 1918, have been in practice at 31 Nassau Street for myself. I was elected secretary of Stochr & Sons, Incorporated at the directors' meeting of October 16, 1918 and have discharged the duties of secretary of said company from that time to now and am now secretary of the company and in charge of the minute books of the company and the correspondence of the company.

Mr. Quinn: I offer in evidence, if your Honor please, the following from the minutes of the meeting of the Board of Directors of Stochr & Sons held November 12, 1918:

"Present: Messrs. James N. Wallace, Andrew B. Duvall, and Paul Kieffer, constituting a quorum of the Board."

The part I offer is marked No. 2, and is entitled:

339 "Sale of 1,290 shares of stock of the Botany Worsted Mills held by the Company."

That is on pages 2, 3 and 4 of the minutes.

Mr. Vorhaus: I object to that as incompetent and immaterial.

Objection overruled.

Marked Defendants' Exhibit N-1.

The Witness (resuming): I have examined the letter files and records of Stoechr & Sons, the partnership, that were in the possession and among the assets of Stoechr & Sons, Incorporated with reference to any particular communication from either Edward or Georg Stoechr to either Hans E. Stoechr or Max W. Stoechr regarding the transfer of the partnership assets of Stoechr & Sons to Stoechr & Sons, Incorporated.

By Mr. Quinn:

Q. Have you found any record of any such communication?

Mr. Vorhaus: If your Honor please, it seems to me he has already proved that by one witness.

Objection overruled.

The Witness (resuming): No, nor did I find in the papers of Stoechr & Sons, Incorporated any record of any communication by Stoechr & Sons, Incorporated to Kammgarn-Spinnerei of a contract of February 20, 1917; either by letter or wireless or any record of any such communication, either in the month of November or December, of 1916, or January, or February or March, 1917; nor any request or demand made by or on behalf of Max W. Stoechr, upon Stoechr & Sons, Incorporated, or its Board of Directors or officers to take any actions respecting the 14,900 shares of stock down
339½ to the time this suit was begun, so far as I have any knowledge or information; nor any communication received by Stoechr & Sons, Incorporated, from Kammgarn-Spinnerei Stoechr & Company, regarding a contract of February 20, 1917, as far as the records show or so far as I have any knowledge or information; that includes any notice or writing or request by wireless regarding the payment of any installment of stock purchased and no notice of any kind under said contract or relating to said contract of February 20, 1917.

By Mr. Quinn:

Q. Did the Alien Property Custodian dictate or attempt to dictate to the Board of Directors of Stoechr & Sons regarding the affairs of Stoechr & Sons?

Mr. Vorhaus: I object to that.
Objection sustained.

Q. Did the Alien Property Custodian make any communication to the Board of Directors of Stoehr & Sons, or to its officers regarding the contract of February 20, 1917?

Mr. Vorhaus: I object to that.
Objection sustained.

Q. The action of the Board in respect to the contract of February 20, 1917, was taken upon the advice of counsel and was based upon that advice, was it not.

Mr. Vorhaus: There was no action taken.

Q. The decision of the Board of Directors regarding the contract of February 20, 1917, was taken, was it not, upon the advice
340 of counsel and based solely upon that advice?

Mr. Vorhaus: The record is there was no action taken; I object to that.
Objection sustained.

(No cross-examination.)

It was stipulated between counsel for both sides that Heyn & Covington were counsel not only for Stoehr & Sons, Incorporated but for the Botany Worsted Mills.

Mr. Quinn, as counsel for the defendants, then offered in evidence a copy of the license by the War Trade Board, dated July 14, 1919, to the world at large, regarding trade communication with the enemy; a similar one relating to dyes and dye-stuffs of July 20, 1919 and a general license permitting certain communications and dealings with respect to enemy property, July 20, 1919. The three were then received in evidence and marked Defendants' Exhibit C-1.

Mr. Bradley, as counsel for the defendants, then offered in evidence photostat copies of the reports made by the Botany Worsted Mills and by Max and Hans Stoehr to the Alien Property Custodian. There were three of them and they were received in evidence and marked Defendants' Exhibits P-1, Q-1 and R-1.

Mr. Bradley: I offer printed copies of various executive orders, which I will identify.

One of October 12, 1917, which among other things, delegates to the Alien Property Custodian the powers conferred upon the President by Section 7 and various subdivisions of the Act.

341 Executive order of February 5, found on page 36 of this pamphlet, elaborating on the same order and some details.

Then executive order beginning on page 37 of the same pamphlet, dated February 26, 1918, conferring, among other things, upon the Alien Property Custodian, the power to affirm or disaffirm any incomplete transaction on the part and on behalf of the enemy.

Another executive order found on page 54 of this same pamphlet,

and dated July 16, 1918, delegating power respecting the sale of property.

Marked Defendants' Exhibit S-1.

Referring to the advertising of property for sale, counsel for plaintiff have agreed to stipulate in order to avoid expanding the record, that of the 25,700 shares mentioned as the shares to be sold, 14,900 were the shares covered by the contract of February 20, 1917, 1,290 were the shares theretofore belonging to Stoeck & Sons, Incorporated, and 9,510 were miscellaneous enemy owned shares. That is merely for the purposes of identification.

Also, said 9,510 were within other demands of the Alien Property Custodian.

Mr. Quinn: I offer a proxy dated March 2, 1914, by Kamnagarn-Spinnerei, Stoeck & Company, to Hans E. Stoeck, authorizing him to vote the stock of Kamnagarn-Spinnerei Stoeck & Company at the annual meeting of March, and state on the record that the two signatures, Mr. Zimmerman tells me, are Dr. Kuntz's, who was one of the two directors, and Mr. Hartz, who was one of the procuristen at that time, this being the proxy that Hans E. Stoeck used at the meeting of March, 1914.

Marked Defendants' Exhibit T-1.

Mr. Quinn: May it be understood that if I find them, that I may have the right to offer other similar proxies?

The Court: Yes; if you find any other relevant proxies they may go in.

Mr. Marshall: Submit them to us, and I think we will be able to make a stipulation.

Defendants' proofs closed.

Rebuttal.

MAX W. STOEHR, a witness recalled in rebuttal, testified as follows:

Direct examination.

By Mr. Vorhaus:

I heard the testimony of Mr. Hesse, who says that there was a meeting held after the Board of Directors of Stoeck & Company was reorganized, as a result of the nominations made by the Alien Property Custodian.

Mr. Vorhaus:

Q. That at that same meeting Mr. Quinn stated or expressed an opinion about the illegality of this contract of February 20, 1917, regarding the 14,900 shares, and that you were present at that meeting, and that you said nothing and made no protest. Will you please explain your silence at that meeting?

Mr. Bradley: I object to that.

Objection overruled.

The Witness (resuming): At first I may say that I do
343 not recall such a remark by Mr. Quinn, and I have been looking over the record.

By the Court: If you do not remember it you cannot give any reason why you were silent.

A. If I would.

Q. Did you hear it?

A. Yes. There were very many things said by Mr. Quinn at the time in regard to the old ownership, and I did not oppose any of those statements, for I knew that Mr. Quinn had my signed resignations in his hands, and if I would have made any statement contrary to Mr. Quinn, it would only have resulted in an acceptance of my resignation.

Mr. Quinn: I move to strike that out as not responsive.

Motion denied.

The Witness: I was very anxious to remain on that Board, for I had an interest in that company. I did not want to do or say anything to antagonize Mr. Quinn; I was there by his grace; he had my signed blank resignation in both companies.

LOUIS MARSHALL, a witness called in behalf of the plaintiff in rebuttal, being duly sworn, testifies as follows:

Direct examination.

By Mr. Vorhaus:

I heard the testimony that Mr. A. Mitchell Palmer gave here this morning in regard to an interview that I had with him this morning. My recollection of that interview accords with the statement made by Mr. Palmer in many respects, but as to one I am quite sure he is mistaken. I was retained by Mr. Vorhaus on behalf of Max W. Stocher in connection with a suit which was under consideration against the Alien Property Custodian with respect to an attempt or a desire to enjoin the sale of the shares of stock of the Botany Worsted Mills, which were, as I was informed, owned by Stocher & Sons, Incorporated.

I had occasion to go to Washington on other matters, and
344 it was suggested that while in Washington I should confer with the Alien Property Custodian with a view of arguing with him in favor of the discontinuance of the efforts to sell these shares of stock. I called at the office of the Alien Property Custodian and had a conversation with Mr. Palmer. I told him that I had been consulted.

I told him that I had been consulted with regard to the matter and our desire was to prevent a sale of these shares of stock. This

was, as I recollect it, subsequent to the proclamation of the armistice and it was before we had prepared any bill of complaint in the case. We had not as yet fully determined as to the course of action to be pursued. I had not personally met Mr. Max W. Stoechr; I had only met counsel. I said that it seemed to me there was no occasion for the sale of these shares; that the shares had been seized by the Alien Property Custodian and that he had named the directors of the corporation; that the business of the corporation would be carried on by these directors; that there was no desire to change the status, and that therefore, nothing could be gained by the sale of these shares of stock. That if the shares of stock were sold at that time, there would be few, if any bidders, unless it were that some of the competitors of the Botany Worsted Mills would form a syndicate for the purpose of buying these shares of stock and thus getting control of the corporation. That the consequence would

345 necessarily be that these valuable shares would be sacrificed, and that there was no reason why that should be done. He indicated that it was his purpose to sell these shares of stock, and I then said that if it was insisted upon carrying out this sale, that we would then feel constrained to bring suit to enjoin the sale, and in that connection I took the position that in so far as it would be undertaken to sell these shares of stock, that we would raise the question of the constitutionality of certain phases of the Trading with the Enemy Act as applicable to such proposed sales.

Mr. Palmer then asked me whether I thought that any American lawyer would have the nerve of raising the question of the constitutionality of that law, to which I replied that I had the nerve to do so in view of the opinions which I entertained.

So far as referring to the mere request for a postponement of the sale, I am sure that Mr. Palmer is mistaken. He was also mistaken in his recollection that I asked him for a postponement because Max was organizing a syndicate that wanted to bid on it. I did not ask for any such postponement. I referred to no such syndicate, and I asked for the absolute discontinuance of the proceedings with regard to the sale, my request being that matters should remain in status quo, and that there was no occasion for any sale. The connection in which a syndicate was spoken of was the suggestion that I had made, that I believed there might be a syndicate of competitors who might aid in this property, and that I knew of nobody else who could or would at this time be able to bid upon these shares of stock, which ran into a very large sum of money, and that the result of such a situation would be the sacrifice of these shares of stock their sale at a price far below their real value. I knew of no such syndicate.

346 I had heard of no such syndicate, and as I have already said,

I had never met Mr. Max W. Stoechr, had no talk with him upon the subject. My conversation before I went to Washington was confined to my interview with Mr. Vorhaus.

(No cross examination.)

The Court: Is that the case?

All Counsel: Yes.

The following documents were offered in evidence and identified in the foregoing minutes as Exhibits in the case.

346½ The following are the plaintiff's exhibits:

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PLAINTIFF'S EXHIBIT 1.

Certificate of Incorporation of Stoehr & Sons, Inc.

We, the undersigned, all being persons of full age, and at least two-thirds being citizens of the United States, and at least one of us a resident of the State of New York, desiring to form a stock corporation pursuant to the provisions of the Business Corporations Law of the State of New York, do hereby make, sign, acknowledge and file this certificate for that purpose as follows:

First. The name of the proposed corporation is "Stoehr & Sons Inc."

Second. The purposes for which the corporation is formed are as follows:

To import, export, buy, sell, manufacture and deal in textiles and textile products, cloths and all articles of textile manufacture and all raw materials entering into textiles, and generally to buy, sell and deal in all kinds of goods, wares and merchandise which may be acquired for any of the purposes of the Company's business and which may be profitably used or dealt in in connection with such business;

To apply for, patent, register, purchase, own, sell, assign or otherwise dispose of any trade marks, trade names and patents, inventions, improvements and processes used in connection with or secured under letters patent of the United States or other countries, and to use, develop or grant licenses in respect of any such trade marks, patents, processes or inventions;

To acquire and own the good will, rights and assets of any person, firm, association or corporation engaged in a similar line of business and which this corporation is authorized to carry on, and to pay for the same in cash or in the stock or bonds of the Company, and to sell or in any manner dispose of the whole or any part of the assets so purchased;

To purchase, acquire, hold and dispose of the stocks, bonds or other obligations of indebtedness of any corporation, domestic or foreign, and to issue in exchange therefor its stocks, bonds or other obligations; to possess and exercise in respect thereof, all the rights, powers and privileges of individual owners or holders thereof and to exercise any and all voting power thereon;

To conduct and transact business in any of the states, territories, colonies or dependencies of the United States, in the District of Columbia and in any and all foreign countries; to have one or more offices therein and therein to hold, purchase, mortgage and convey real and personal property without limitation as to amount but always subject to the local laws.

349 Third. The amount of the capital stock is Two hundred and fifty thousand dollars (\$250,000), all of the same being common stock.

Fourth. The number of shares of which the capital stock shall consist is Twenty-five hundred (2,500) of the par value of one hundred dollars (\$100) each, and the amount of capital with which the corporation shall begin business is Two hundred and fifty thousand dollars (\$250,000).

Fifth. The principal office of the corporation is to be located in the Borough of Manhattan, City of New York.

Sixth. Its duration is to be perpetual.

Seventh. The number of its directors is to be four, and it is hereby provided pursuant to law that directors are not required to be stockholders.

The Board of Directors may hold their meetings and have an office or offices outside of the State of New York.

Eighth. The names and Post-office addresses of the directors for the first year are as follows:

Names.	Post-office addresses.
Hans E. Stoehr.....	200 Fifth Avenue, Borough of Manhattan, City of New York.
Max W. Stoehr.....	200 Fifth Avenue, Borough of Manhattan, City of New York.
Alfred de Liagre.....	200 Fifth Avenue, Borough of Manhattan, City of New York.
Georg G. Röhlig.....	200 Fifth Avenue, Borough of Manhattan, City of New York.

350 Ninth. The names and post-office addresses of the subscribers to this certificate and a statement of the number of shares of stock which each agrees to take in the corporation are as follows:

Names.	Post-office addresses.	No. of shares.
Max W. Stoehr....	200 Fifth Avenue, Borough of Manhattan, City of New York	8
Georg G. Röhlig....	200 Fifth Avenue, Borough of Manhattan, City of New York	1
Alfred de Liagre....	200 Fifth Avenue, Borough of Manhattan, City of New York	1
		<hr/> 10

In witness whereof, we have made, signed, acknowledged and filed this certificate in duplicate this 15th day of February, 1917.

MAX W. STOEHR.
GEORG G. RÖHLIG.
ALFRED DE LIAGRE.

In the presence of:
GEO. E. MOESEL.

STATE OF NEW YORK,
County of New York, ss:

On this 15th day of February, 1917, before me personally came Max W. Stoehr, Georg G. Röhlig and Alfred de Liagre to me personally known to be the persons described in and who made and signed the foregoing certificate and they severally duly acknowledged to me that they had made, signed and executed
351 the same for the uses and purposes therein set forth.

GEO. E. MOESEL,
Notary Public.

Kings Co. No. 297.
Kings Co. Reg. No. 7167.
Certificate filed in New York Co.
N. Y. Co. No. 385.
N. Y. Reg. No. 7335.

352 PLAINTIFF'S EXHIBIT 2.

Waiver of Notice and Minutes of First Meeting of Stockholders and Incorporators of Stoehr & Sons, Inc.

Held February 19th, 1917.

353 Stoehr & Sons, Inc.

Waiver of Notice of First Meeting of the Stockholders and Incorporators of Stoehr & Sons, Inc.

We, the undersigned, being all the stockholders and incorporators of the above named Company, do hereby waive notice of the time, place and object of holding the first meeting of the stockholders and incorporators of the said Company, and do hereby appoint the office of the Company No. 200 Fifth Avenue, in the Borough of Manhattan, City of New York, as the place, and February 19th, 1917, at 4:30 o'clock P. M. as the time of holding said meeting, and do hereby consent to and ratify any and all action of the stockholders and incorporators taken at said meeting.

Dated, New York, February 19th, 1917.

MAX W. STOEHR.
GEORG G. RÖHLIG.
ALFRED DE LIAGRE.

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Stoehr & Sons, Inc.

*Minutes of First Meeting of the Incorporators and Stockholders of
Stoehr & Sons, Inc.*

The first meeting of the incorporators of Stoehr & Sons, Inc., was held on the 19th day of February, 1917, at 4:30 o'clock P. M. at the office of the Company, No. 200 Fifth Avenue, in the Borough of Manhattan, City of New York, pursuant to a written waiver of notice signed by all of the incorporators fixing said time and place.

The following incorporators were present in person:

Messrs. Max W. Stoehr, Georg G. Rohlig, Alfred de Liagre, being all the incorporators of the said Company and subscribers to stock of the corporation as shown by the Certificate of Incorporation.

Mr. Max W. Stoehr was elected chairman of the meeting and Mr. Alfred de Liagre was appointed secretary thereof.

The chairman reported that the certificate of incorporation of the Company was recorded and filed in the office of the Secretary of State of the State of New York on the 16th day of February, 1917, and a duplicate original of said certificate was recorded and filed in the office of the Clerk of the County of New York on the 17th day of February, 1917.

The Secretary presented a form of by-laws for the regulation of the affairs of the Company, which were read article by article
355 and unanimously adopted.

The following resolution was thereupon adopted:

Whereas the firm of Stoehr & Sons has offered to sell and transfer to this Company the business mentioned in their written offer presented to the meeting, in consideration of the issuance of the entire capital stock of the Company, viz: Two hundred and fifty thousand dollars (\$250,000), all of the same being common stock, full paid and non-assessable, and the assumption by this Company of all the liabilities of Stoehr & Sons; and

Whereas it appears to the stockholders of this Company that such business is necessary for this Company and that the same is at least of the fair and reasonable value of Two hundred and fifty thousand dollars (\$250,000) and the amount of said liabilities,

Resolved that the Board of Directors be and they hereby are authorized to purchase said business and to issue said stock in payment thereof.

Further resolved that the stock so to be issued in payment of the said business authorized to be purchased by the resolution set forth above, shall include the stock subscribed by the incorporators of this Company as evidenced by the certificate of incorporation.

Further resolved that the Company accept in payment of the subscriptions of the incorporators as evidenced by the certificate of incorporation, the business agreed to be sold to the Company as set forth in the preceding resolution.

Resolved further that the entire stock of the Company, viz: Two hundred and fifty thousand dollars (\$250,000), shall be full paid and non-assessable.

On motion duly made, seconded and carried, it was
356 Resolved that the seal an impression
of which is hereto affixed, be adopted (Impression of seal.)
as the corporate seal of the Company.

The following persons were thereupon elected directors of the Company: Messrs. Hans E. Stoehr, Max W. Stoehr, Georg G. Röhlig, Alfred de Liagre.

The following papers were ordered to be filed in this minute book for the purpose of reference:

1. Copy of certificate of incorporation.
2. Waiver of notice of meeting.
3. Original by-laws.

There being no further business before the meeting the same thereupon adjourned.

ALFRED DE LIAGRE,
Secretary.

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PLAINTIFF'S EXHIBIT 3.

Stoehr & Sons to Stoehr & Sons, Inc.

Offer and Bill of Sale.

Dated February 19, 1917.

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New York, February 19th, 1917.

Stoehr & Sons, Inc.,
New York City.

GENTLEMEN:

The undersigned partnership of Stoehr & Sons, does hereby offer to sell to your Company the business, property, good will, firm name and all other assets of Stoehr & Sons in consideration of Two hundred and fifty thousand dollars (\$250,000) of the common stock of your Company, full paid and non-assessable, and of the assumption by your Company of all the liabilities of Stoehr & Sons.

Yours truly,

STOEHR & SONS.

February 19th, 1917.

The foregoing offer is hereby accepted upon the above terms and the said liabilities are hereby assumed.

STOEHR & SONS, INC.,
By GEORG G. ROHLIG,
Vice-Pres.

MAX W. STOEHR, *Sec'y.*

359 Know all men by these presents, that we, Stoehr & Sons, co-partnership, for a valuable consideration, the receipt whereof is hereby duly acknowledged by us, have bargained, sold assigned, transferred and set over and by these presents do bargain, sell, assign, transfer and set over unto Stoehr & Sons Inc., a New York corporation, its successors and assigns, all fixtures, merchandise, office furniture, stock in trade, bank accounts, cash on hand, and in banks, bills receivable and bills payable, outstanding accounts, good will, the firm name and its exclusive use and any and all other assets of said co-partnership, to have and to hold the said transferred property, assets and accounts unto the said Stoehr & Sons Inc. its successors and assigns forever, and we do hereby give to the said Stoehr & Sons Inc. its successors and assigns full power and authority for its or their own use and benefit to ask, demand, collect, receive and give receipt for any of the outstanding accounts, accounts receivable or indebtedness owing to said co-partnership hereby transferred, and either in our name or in the name of said corporation or otherwise to prosecute any suit or proceeding at law or in equity to the same. In witness whereof we have hereunto signed our firm name this 19th day of February, 1917.

STOEHR & SONS.

In the presence of:
MAX W. STOEHR.

360 *Note for Printer Regarding Plaintiff's Exhibit 4.*

The endorsement on the back of Plaintiff's Exhibit 4, including the "Note", should be printed in full, following the exhibit.

361 Pl.'s Ex. 4.

A. P. C. Form No. 101.

File No. —.

Alien Property Custodian.

Report by a Corporation Incorporated within the United States, Unincorporated Association, Company, Trustee, or Trustees within the United States, Issuing Shares or Certificates Representing Beneficial Interests, under Section 7(a), "Trading with the Enemy Act."

Penalty.

Failure to make this report to the Alien Property Custodian as provided by law (see extract of act below) is punishable by imprisonment for not more than ten years or fine of not more than ten thousand dollars, or both.

Pursuant to the provisions of section 7(a) of the "Trading with the enemy Act," the Alien Property Custodian hereby requires a written statement under oath containing all the particulars specified in this form.

Instructions.

(1) Read carefully all of this report form and instructions before beginning to make report. Write legibly, using typewriter where possible.

(2) Person.—The word "person" is defined by section 2 of the act as follows:

"The word 'person,' as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic."

(3) Who Must Make This Report, and Whose Stock Must be Reported.—The first two paragraphs of section 7(a) of the act provide as follows:

"That every corporation incorporated within the United States, and every unincorporated association, or company, or trustee or trustees within the United States, issuing shares or certificates representing beneficial interests, shall, under such rules and regulations as the President may prescribe, and, within sixty days after the passage of this act, and at such other times thereafter as the President may require, transmit to the alien property custodian a full list, duly sworn to, of every officer, director, or stockholder known to be, or whom the representative of such corporation, association, company, or trustee has reasonable cause to believe to be an enemy or ally of enemy resident within the territory, or a subject or citizen residing outside of the United States, of any nation with which the United States is at war, or resident within the territory, or a subject or citizen residing outside of the United States, of any ally of any nation with which the United States is at war, together with the amount of stock or shares owned by each such officer, director, or stockholder, or in which he has any interest.

"The President may also require a similar list to be transmitted of all stock or shares owned on February third, nineteen hundred and seventeen, by any person now defined as an enemy or ally of enemy, or in which any such person had any interest; and he may also require a list to be transmitted of all cases in which said corporation, association, company, or trustee has reasonable cause to believe that the stock or shares on February third, nineteen hundred and seventeen, were owned or are owned by such enemy or ally of enemy, though standing on the books in the name of another."

The Alien Property Custodian, acting under the authority vested in him by the President, including all power and authority to require lists and reports, has issued an order requiring such similar list of all stock or shares owned on February 3, 1917, by any such person defined as an enemy or ally of enemy or in which any such person had any interest; and also a list of all cases in which said corporation, association, company, or trustee has reasonable cause to believe that the stock or shares on February 3, 1917, were owned or are

owned by such enemy or ally of enemy, though standing on the books in the name of another.

(4) Enemy.—For the purpose of this report, the word "enemy," as defined by section 2 of the act, includes the following:

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

"(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof."

Ally of Enemy.—For the purpose of this report, the words "ally of enemy," as defined by section 2 of the act, include the following:

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

"(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof."

(5) If a person, even an American citizen, is resident within the territory of an enemy or ally of enemy, including that occupied by its military and naval forces, his stock or shares must be reported.

(6) The term "enemy" or "ally of enemy," as used in this form, includes any person whom you may have reasonable cause to believe to be an enemy or ally of enemy.

(7) On October 6, 1917, the United States was at war with Germany; the allies of Germany were Austria-Hungary, Bulgaria, and Turkey.

362 (8) Do not leave any question unanswered. If a negative answer is intended, write "None" or "No."

(9) If the space provided in any schedule in this form is inadequate, a complete schedule in like form and bearing the corresponding schedule number must be prepared, signed, attached to this report, and made a part hereof. Do not put a part of the

information in the space on this form and part on an attached sheet.

Alien Property Custodian, Washington, D. C.:

The undersigned, in pursuance of section 7 (a) of the "Trading with the Enemy Act," approved October 6, 1917, transmits to the Alien Property Custodian the following lists of every officer, director, or stockholder of the undersigned known to be, or whom the representative of the undersigned has reasonable cause to believe to be an enemy or ally of enemy resident within the territory, or a subject or citizen residing outside of the United States, of any nation with which the United States is at war, or resident within the territory, or a subject or citizen residing outside of the United States, of any ally of any nation with which the United States is at war, together with the amount of stock or shares owned at any time on or after October 6, 1917, by each such officer, director, or stockholder, or in which he had or has any interest; and a similar list of all stock or shares owned on February 3, 1917, by any person defined in the act as an enemy or ally of enemy, or in which any such person had any interest; and also a list of all cases in which the undersigned has reasonable cause to believe that the stock or shares on February 3, 1917, were owned or are owned by such enemy or ally of enemy, though standing on the books in the name of another; to wit:

NOTE.—Before receipt of this form a report was made by letter under date of December 3, 1917, to the Alien Property Custodian.

(1) Name of corporation, unincorporated association, company, trustee, or trustees making report:
Stoehr & Sons Inc.

(2) Address of principal place of business:
200 Fifth Avenue, New York City, New York, New York.
(No.) (Street.) (City.) (County.) (State.)

(3) State whether corporation, unincorporated association, company, trustee or trustees.
Corporation.

(4) If corporation, state where incorporated; if unincorporated association, company, trustee or trustees, state how created, or how organized.
New York State.

Schedule 1.

Enemy or Ally of Enemy Officers and Directors on or After October 6, 1917.

Name.	Official position.	Last known residence.	Nationality.
None.	None.		

Schedule 2.

Enemy or Ally of Enemy Holders of Stock, Shares, or Certificates of Beneficial Interests on or After October 6, 1917.

(Include herein the officers and directors holding stock, shares or certificates.)

Name of registered owner.	Name of enemy or ally of enemy who is stockholder or for whom stock is held.	Residence (if unknown, last known address).	Nationality.	No. of shares.	Par value of each share.	No. of certificates.	Class or kind of stock.	Amount of dividends unpaid.	Actual location of certificate.
Max W. Stoehr Trustee.	1293 Eduard Stoehr	Leipzig Germany.	German	1875	\$100	1	Common stock voting trust certificate	6%	In possession Max W. Stoehr of Passaic, N. J.
	532								
Max W. Stoehr Trustee	Georg Stoehr	"	"	222 21/100	\$100	3	"	6%	"

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Schedule 3.

Enemy or Ally of Enemy Holders of Stock, Shares, or Certificates Representing Beneficial Interests on February 3, 1917.

(Include herein the officers and directors holding stock, shares, or certificates.)

Name of registered owner who is enemy or ally of enemy.	Residence (if unknown, last known address).	Nationality.	No. of shares.	Par value of each share.	No. of certificate.	Class or kind of stock.	Amount of dividends unpaid.	Actual location of certificate.
Name	Name	.....	.....	.....	.....	.....	.....	.....

Schedule 4.

List of All Cases in Which the Undersigned Has Reasonable Cause to Believe That the Stock or Shares on February 3, 1917, Were Owned or Are Owned by an Enemy or Ally of Enemy, though Standing on the Books in the Name of Another.

Name of registered owner.	Name of enemy or ally of enemy for whom stock is believed to be held.	Residence (if unknown, last known address).	Nationality.	No. of shares.	Par value of each share.	No. of certificate.	Class or kind of stock.	Amount of dividends unpaid.	Actual location of certificate.
Name of registered owner.	Name of enemy or ally of enemy for whom stock is believed to be held.	Residence (if unknown, last known address).	Nationality.	No. of shares.	Par value of each share.	No. of certificate.	Class or kind of stock.	Amount of dividends unpaid.	Actual location of certificate.

Stoehr & Sons, Inc.

Note Attached to List of Stockholders, &c., on Form 101, Made to Alien Property Custodian.

This Company was not in existence on February 3rd, 1917. However it states for the information of the Alien Property Custodian that it was organized on February 19, 1917 under the Laws of the State of New York, to take over and become the successor to Stoehr & Sons, a partnership at 200 Fifth Avenue, Borough of Manhattan, City of New York, consisting of four partners, namely Hans E. Stoehr, New York City, Max W. Stoehr of Passaic, N. J., Edward Stoehr and Georg Stoehr, the two latter of Leipzig, Germany. The capital stock of the Company was issued to the four partners in the same proportion as their interest in the partnership and the corporation assumed the indebtedness of the partnership.

STOEHR & SONS, INC.,
Per MAX W. STOEHR,
Treas.

The following question must also be answered by the person making this report:

Did you on February 3, 1917, or at any time on or after October 6, 1917, hold, have, or have the custody or control of any property beneficial or otherwise, alone or jointly with others, of, for, or on behalf of any person who is an enemy or ally of enemy, or whom you may have reasonable cause to believe to be an enemy or ally of enemy, and of which you have not yet made report to the Alien Property Custodian, or were you on February 3, 1917, or at any time on or after October 6, 1917, in any way indebted to any such person and have not yet made report of such debt to the Alien Property Custodian?

Answer: No. (See typewritten note attached.)
(If the question is answered in the affirmative, additional forms will be furnished upon request.)

(Signature of party making report.)

[SEAL.]

STOEHR & SONS, INC.,
MAX W. STOEHR,
Treasurer & one of the voting trustees.

(Corporations or associations should sign by officer or duly authorized representative, and should affix corporate or official seal.)

Affidavit of Individual Trustee or Trustees Making Report.

STATE OF ———,
County of ———, ss:

I/We swear (or affirm) that the foregoing report and answers therein made are true and correct.

Subscribed and sworn to before me this ——— day of ———, 191—

Affidavit of Officer or Representative of Corporation or Association Making Report.

STATE OF NEW YORK,
County of New York, ss:

I swear that I am the Treasurer of the corporation making the foregoing report, and that the foregoing report and answers therein made are true and correct.

MAX W. STOEHR.

Subscribed and sworn to before me this 6th day of December, 1917.
GEO. DEWITT WEEKS,
Notary Public.

Kings County, N. Y. No. 34.

364a [Endorsed:] Report No. 4845. Trust No. 532 & 1293.
(Do not write on this back, which is to be filled out only in the office of Alien Property Custodian.) Alien-property Custodian. Report by a Corporation Within the United States, Unincorporated Association, Company, Trustee, or Trustees Within the United States. Issuing Shares or Certificates Representing Beneficial Interests, under the First Two Paragraphs of Section 7 (a), "Trading with the Enemy Act." ———, Reporting Corporation. 1-19-1918. Received and entered in Register of Reports and referred to Director, Bureau of Investigation. K. W. Greene, Report Register Clerk, Accounting Section, Division of Accounts. Dec. 17, 1917. Referred to Director, Bureau of Trust with action of this Bureau attached. F. P. Gamon, Director, Bureau of Investigation. ———, 191—. Received and credited to Bureau of Investigation in Register of Reports and referred to Division of Individual Property—Corporations. ———, Director, Bureau of Trusts. ———, 191—. Referred to ———, Chief of Division of Individual Property—Corporations. ———, 191—. Referred to ———. ———. Filed by ———. Date filed.

NOTE.—Before receipt of this form a report was made by letter under date of December 3, 1917, to the Alien Property Custodian.

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PLAINTIFF'S EXHIBIT 5.

Agreement made this 19th day of February, in the year 1917, between all the stockholders of Stoehr & Sons, Inc., hereinafter called "stockholders," parties of the first part, and Hans E. Stoehr, Max W. Stöhr and Georg Röhlig, hereinafter called "voting trustees," parties of the second part.

Whereas, the stockholders deem it to their interest to act together concerning the management of Stoehr & Sons, Inc., and to that end to unite the voting power held by them as such stockholders and to place the same in the hands of the voting trustees as hereinafter provided.

Now, this agreement made in consideration of the premises and of the mutual covenants herein contained and of One (\$1.00) dollar by each of the parties hereto in hand paid, witnesseth as follows:

(1) Each of the stockholders hereby severally agree to deposit the stock and the certificates therefor and each of said stockholders has so deposited the same and the certificates therefor with sufficient transfers thereof in favor of the persons hereinbefore named as voting trustees, with the said voting trustees, thus placing in the hands of the voting trustees the entire capital stock of said Stoehr & Sons, Inc., and each of said stockholders shall receive in exchange therefor the trust receipts or certificates hereinafter referred to, which deposit shall continue for the period of five (5) years from the date of this agreement, that is, until the 19th day of February, 1922, and said voting trustees are authorized to cause the stock certificates so deposited to be transferred upon the books of the said company to the names of said voting trustees and to cause such further or other transfers to be made as may become necessary through the occurrence of any change of the persons holding the office of voting trustee as hereinafter provided and during said period and until February 19,

1922, the voting trustees shall possess and be entitled to
366 exercise all rights of every name and nature, including the right to vote in respect to any and all such shares deposited; it being, however, understood that the holders of the trust certificates to be issued by the voting trustees as hereinafter provided shall be entitled to receive payments equal to the dividends, if any, collected by said voting trustees upon the shares of stock of the said company standing in their name.

(2) The voting trustees hereby promise and agree with the said stockholders and with every holder of certificates issued as herein-after provided, that the said trustees will cause to be issued to each of the several stockholders a receipt or certificate for the number of shares transferred and delivered to the voting trustees in substantially the form of the trust receipt or certificate set forth in Exhibit A hereto annexed and made part hereof.

(3) At the expiration of the said period, to wit, after February 19, 1922, and within (10) days after demand the voting trustees

in exchange for and upon the surrender of the aforesaid trust receipts or certificates then outstanding will in accordance with the terms hereof, deliver to the then holders of the trust receipts or certificates, proper certificates of the equivalent kind and amount of the common stock of the said company.

(4) All questions arising between the voting trustees shall from time to time be determined by the decision of at least two of the three voting trustees either at a meeting or by writing with or without a meeting and in like manner said voting trustees may establish rules of action under this agreement. The decision or act of two of the voting trustees shall for the exercise of the voting power and for all purposes of this agreement, be deemed the decision or act of all the voting trustees. At any meeting of the voting trustees, the presence of two of said trustees shall be necessary to constitute
367 a quorum and no action shall be taken without such quorum.

(5) In voting the stock held by them the voting trustees will exercise their best judgment from time to time to select suitable directors to the end that the affairs of the company shall be properly managed and in voting on any other matters which may come before them at any stockholders' meeting, will exercise like judgment, but it is understood that no voting trustee assumes or incurs any responsibility by reason of any error of judgment or error of law or of any matter or thing done or omitted under this agreement except for his own individual malfeasance.

(6) In the event that a vacancy or vacancies shall occur in the office of voting trustee then the same shall be filled as follows:

(a) In case of the death, resignation or disability of either of said voting trustees such trustee shall be succeeded by Alfred de Liagre.

(b) In the event of the death, resignation or disability of either of said voting trustees, and if by reason of the death, resignation or disability, or for any other reason said vacancy cannot be filled by Alfred de Liagre, or in case more than one of said voting trustees shall die, resign or be disabled, or in the event that a vacancy or vacancies occur in the office of voting trustee which has not been otherwise provided for herein, then any such vacancy or vacancies shall be filled by the surviving trustee or trustees, and in such event such surviving trustee or trustees shall fill such vacancy by the appointment of a successor or successors, such appointment to be made by designating such successor or successors in writing and obtaining from such successor or successors his acceptance of the trust in writing. The term "voting trustees" as herein used shall apply to the parties of the second part as well as their successor or successors hereunder, and such successor or successors shall have
368 the same powers, obligations, duties and discretion as are herein vested in the voting trustees named herein.

In witness whereof the several parties hereto have hereunto set their hands and seals the day and year first above written and the

voting trustees have hereunto set their hands and seals in token of their acceptance of the trust hereby created.

HANS E. STOEHR,
MAX W. STÖHR,
Stockholders.

HANS E. STOEHR,
MAX W. STÖHR,
GEORG G. RÖHLIG,
Voting Trustees.

In the presence of:
HERBERT A. HEYN.

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EXHIBIT A.

Trust Receipt or Certificate.

This is to certify, that as hereinafter provided — — will be entitled to receive a certificate or certificates for — fully paid shares of the par value of one hundred dollars each, in common stock of Stoehr & Sons Inc. on February 19, 1922, and in the meantime to receive payments equal to the dividends, if any, collected by the undersigned voting trustees upon a like number of shares of such common stock standing in their names. And until the 19th day of February, 1922 the voting trustees shall possess and be entitled to exercise all rights of every name and nature, including the right to vote in respect of any and all such stock; it being expressly stipulated that no voting right passes to the holder thereof by or under this certificate, or by or under any agreement, express or implied.

This certificate is issued pursuant to the terms of an agreement in writing, dated the 19th day of February, 1917 and entered into between all stockholders of said company and said voting trustees.

This certificate is transferable only on the books which shall be kept for that purpose by said voting trustees, by the registered holder, either in person or by attorney, duly authorized, according to rules which shall be established for that purpose by said voting trustees, and on surrender hereof; and until so transferred, the said voting trustees may treat the registered holder as owner hereof for all purposes whatsoever, except that the delivery of such certificates hereunder shall not be made without the surrender hereof.

This certificate is not valid unless signed by the voting trustees.

In witness whereof said voting trustees have caused this
370 certificate to be signed this — day of —, 19—.

_____,
_____,
_____,
Voting Trustees.

371 Plaintiff's Exhibit 6 should be printed: (a) the face, without of course the blue stamps of the word "Void;" (b) the extract from the by-laws at top of page 2, and one of the brackets

containing a form of assignment with the blank lines properly spaced, and then the following:

"Said form of certificate on four pages contained 21 other blank forms of assignments similar to the foregoing, printed upon the second, third and fourth pages thereof."

(c) Following this should come the talon printed in full, without of course the stamped word "Void", and then following that talon should be printed in full the last coupon, No. 56, reading:

"For the second half of the business year 1917" and following that coupon should be printed the following:

"Said talon also had four other printed forms of coupons for dividends, namely for the first half of the year 1918, preliminary dividend, for the second half of the year 1918, final dividend, and for the first half of the year 1919, preliminary dividend, and for the second half of the year 1919, final dividend."

(Here follows reproduction of bond, marked Plaintiff's Exhibit No. 6, pages 372-374, and coupons, marked page 375.)

FOLD*OUTS ARE TOO LARGE TO BE FILMED

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PLAINTIFF'S EXHIBIT 7.

Waiver of Notice of Meeting and Minutes of Meeting of the Board of Directors of Stoehr & Sons, Inc., Held February 20th, 1917.

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Stoehr & Sons, Inc.

Waiver of Notice of Meeting of the Board of Directors of Stoehr & Sons, Inc.

We, the undersigned, being all the directors of the above named Company, do hereby waive notice of the time, place and object of holding a meeting of the Board of Directors of said Company, and do hereby appoint the office of the Botany Worsted Mills, at Passaic, New Jersey, as the place, and February 20th, 1917, at 10:30 o'clock A. M. as the time of holding the said meeting, and do hereby consent to and ratify any and all action of the Board of Directors taken at said meeting.

Dated New York, February 20, 1917.

HANS E. STOEHR
MAX W. STOEHR.
GEORG G. ROHLIG.
ALFRED DE LIAGRE.

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Stoehr & Sons, Inc.

Minutes of Meeting of the Board of Directors of Stoehr & Sons, Inc.

A meeting of the Board of Directors of the above named Company was held on the 20th day of February, 1917, at 10:30 o'clock A. M. at the office of the Botany Worsted Mills, at Passaic, New Jersey, pursuant to a written waiver of notice signed by all of the directors fixing said time and place.

The following directors were present:

Messrs. Hans E. Stoehr, Max W. Stoehr, Alfred de Liagre, Georg G. Rohlig, constituting the entire Board of Directors.

Mr. Hans E. Stoehr, president, presided and Mr. Max W. Stoehr acted as secretary of the meeting.

The secretary presented and read a waiver of notice of the meeting signed by all of the directors which was ordered filed in this minute book.

The minutes of the meeting of the Board of Directors held on the 19th day of February, 1917, were read and approved.

The matter of the purchase of Fourteen thousand nine hundred (14,900) shares of the capital stock of the Botany Worsted Mills was presented to the meeting and was discussed.

A form of proposed contract between this Company and the corporation of Kammgarnspinnerei Stoehr & Company relating to the said purchase was laid before the meeting.

On motion duly made, seconded and carried, the said contract was approved and the Vice President and Secretary of the Company were directed to execute the same in Passaic, New Jersey, for
379 and on behalf of this Company.

There being no further business before the meeting the same thereupon adjourned.

MAX W. STOEHR,
Sec'y.

380 Plaintiff's Exhibit 8 is attached to the Bill of Complaint and marked Exhibit I; therefore the printing of same is unnecessary.

381 PLAINTIFF'S EXHIBIT 9.

A. P. C. Form No. 106-A.

Report No. 5263.
Trust No. F-4017.

Original.

Demand on Corporation for Stockholder's Interest Without Presentation of Certificates.

Alien Property Custodian.

Demand by Alien Property Custodian for Property.

Extracts from "Trading with the Enemy Act."

Sec. 7 (c). "If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian."

Sec. 7 (e). "No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act."

"Any payment, conveyance, transfer, assignment or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. The alien property custodian and such other persons as the President may appoint shall have power to execute, acknowledge, and deliver any such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such acquittance and discharge, and shall, in case of payment to the alien property custodian of any debt or obligation owed to an enemy or ally of enemy, deliver up any notes, bonds or other evidences of indebtedness or obligation, or any security therefor in which such enemy or ally of enemy had

any right or interest that may have come into the possession of the alien property custodian, with like effect as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor, or obligee."

Extracts from Executive Order of February 26, 1918.

Sec. 1 (c). "The words 'right,' 'title,' 'interest,' 'estate,' 'power,' and 'authority' of the enemy, as used herein, shall be deemed to mean respectively such right, title, interest, estate, power, and authority of the enemy as may actually exist and also such as might or would exist if the existing state of war had not occurred, and shall be deemed to include respectively the right, title, interest, estate, power, and authority in law or equity or otherwise of any representative of or trustee for the enemy or other person claiming under or in the right of, or for the benefit of, the enemy."

Sec. 2 (a). "A demand for the conveyance, transfer, assignment, delivery, and payment of money or other property, unless expressly qualified or limited, shall be deemed to include every right, title, interest, and estate of the enemy in and to the money or other property demanded as well as every power and authority of the enemy thereover."

Sec. 2 (c). "When demand shall be made and notice thereof given, as hereinbefore provided, such demand and notice shall forthwith vest in the Alien Property Custodian such right, title, interest, and estate in and to and possession of the money or other property demanded and such power or authority thereover as may be included within the demand, and the Alien Property Custodian may thereupon proceed to administer such money and other property in accordance with the provisions of the 'Trading with the Enemy Act' and with any orders, rules, or regulations heretofore, hereby, or hereafter made by me or heretofore or hereafter made by the Alien Property Custodian."

Sec. 3 (d). "The Alien Property Custodian may exercise any right, power, or authority of the enemy in, to, and over corporate stock, shares, or certificates representing beneficial interests owing or belonging to or held for, by, on account of, or on behalf of or for the benefit of an enemy, including (1) the right to receive all notices issued by the corporation, unincorporated association, company, or trustee which issued such stock, shares, or certificates, to the holders or owners of similar stock, shares, or certificates, (2) the right to exercise all voting power appertaining to such stock, shares, or certificates, and (3) the right to receive all subscription rights, dividends, and other distributions and payments, whether of capital or income, declared or made on account of such stock, shares, or certificates, regardless of whether or not such stock, shares, or certificates be in the possession of the Alien Property Custodian and regardless of whether or not such stock, shares, or certificates have been trans-

ferred to the Alien Property Custodian upon the books of the corporation, association, company, or trustee issuing the same."

To Betsey Worsted Mills,

Address, Dayton Avenue, Passaic, New Jersey:

I, A. Mitchell Palmer, Alien Property Custodian, duly appointed, qualified, and acting under the provisions of the Act of Congress known as the "Trading with the enemy Act," approved October 6, 1917, and the executive orders issued in pursuance thereof, by virtue of the authority vested in me by said act, and by said executive orders, after investigation do determine that: *Stoehr & Company,*

(*Name of enemy or ally of enemy.*)

(*Kammgarn Spinnerei*) whose address is *Leipzig, Germany*, is an

(*Last known address.*)

enemy (not holding a license granted by the President), and has a certain right, title, and interest in and to 14,900 shares of Common stock standing on your books in the name of *Stoehr &*

(*Common, preferred.*)

Sema, Incorporated.

I, as Alien Property Custodian, do hereby require that you shall convey, transfer, assign, and deliver to me as Alien Property Custodian, to be by me held, administered, and accounted for as provided by law, every right, title, and interest of the said enemy in said stock, including in respect to the said stock the right which the said enemy may have, (a) to receive all notices issued by you to the holders or owners of similar stock, shares, or certificates; (b) to exercise all voting power appertaining to such stock, shares, or certificates; (c) to receive all subscription rights, dividends, and other distributions and payments, whether of capital or of income, declared or made on account of such stock, shares, or certificates.

I, as Alien Property Custodian, do hereby further require that you note the substance of this demand upon your stock books and/or stock ledger, and that you furnish a copy of this demand to the registrar and/or transfer agent, if any, of the stock in respect to which this demand is made.

I, as Alien Property Custodian, do hereby further require that within ten days from the service of this demand upon you, you report to me any and all acts which you have done, or omitted to do, pursuant to the requirements of this demand.

Until otherwise directed, you will remit to the Alien Property Custodian at Washington, by check payable to his order, all payments, whether of capital or income, now or hereafter declared or due on account of such stock, shares, or certificates, and you will direct such notices in respect to the said stock, shares, or certificates to the Alien Property Custodian.

This demand is supplementary to any demand which may hitherto have been made upon you, accompanied by the presentation of certificates which represent shares or beneficial interests, for the transfer into my name, as Alien Property Custodian, of such certificates, or for the transfer thereof into the name of any nominee of me as

Alien Property Custodian, and this demand shall not prejudice or affect any demand accompanied by such certificates which has been, or which may hereafter be, made.

Witness my hand and seal of office, this 5th day of April, 1918.

A. MITCHELL PALMER,
Alien Property Custodian,

(Sgd.)

By T. L. DAVIS,
Managing Director.

Attached to the foregoing exhibit was a rider pasted on the face of said exhibit, which rider was as follows:

A. P. C.-M. M.-188.

You are hereby instructed to remit all accumulated dividends direct to this office upon receipt hereof. If checks for accumulated dividends have heretofore been drawn in favor of the enemy and are now held by you, you may send such checks direct to this office. All future dividends shall be remitted to Peoples Bank & Trust Co. as depository for Alien Property Custodian, Trust No. F-4017, which has been duly designated as the depository of this trust.

You will also direct all notices hereby demanded, to said depository and identify each notice by the trust number heretof.

382 Service of the within demand accepted this — day of —, 191—.

— — —.

Served the within notice and demand on the within-named —, at — Street in the City of —, State of —, this — day of —, 191—, by giving a true and correct copy thereof to —, a — of the corporation of whom said demand is made, at the office of said corporation.

— — —.

Served the within demand and notice on the corporation to which this demand is addressed, by transmitting a true and correct copy thereof to the said corporation at the address which appears on the face hereof, in a securely fastened official franked wrapper, registered at the post office at — in the city of Washington, on the — day of —, 191—.

— — —.

Alien Property Custodian, Washington, D. C. Inclosure No. 6650. A. P. C. 72.

(Here follows reproduction of book, marked Plaintiff's Exhibit 10, pages 383-396.)

PLAINTIFF'S EXHIBIT 11.

Financial Statement Botany Worsted Mills, Passaic, N. J.

[Cut of Trade-mark.]

November 30th, 1917.

Passaic, N. J., July 23rd, 1918.

To the Stockholders of Botany Worsted Mills:

The Treasurer respectfully submits the following financial report of your Company for the year ended November 30th, 1917:

The sales of the Company for the year were \$28,191,088. as compared with \$18,446,898. for the previous year. This increase was largely due to advance in prices occasioned by the reduction of importations into this country, to the marked advance in prices of raw material, and to the unusual conditions produced by the war. The Company is now engaged to a large extent in filling contracts with the U. S. Government on which it expects to make only a small profit.

The Net Profits for the year after deducting all charges and operating expenses excluding Reserve for Excess Profits

and Federal Income Taxes were\$6,611,162.73

Deduct:

Interest for the year on 6% Gold Bonds..... 102,010.00

Net Income 6,509,152.73

Less Reserve for Excess Profits and Federal Income Taxes 3,005,640.41

Net Income, applicable to Surplus 3,503,512.32

Surplus November 30th, 1916..... 1,765,877.52

Amount transferred to Surplus from Reserve for Depreciation in Buildings, and Machinery & Fixtures (considered excessive) 2,139,975.94

7,409,365.78

Less Dividends paid on Capital Stock during the year, one of 3% and one of 14% 612,000.00

Surplus November 30th, 1917\$6,797,365.78

399 Botany Worsted Mills Financial Statement, November 30th, 1917.

Assets.

Real Estate, Machinery and Fixtures. . \$8,257,280.99
Raw Wool, Finished Goods and Operating Supplies 15,371,871.12
Stock in Other Companies and Liberty Bonds 319,000.00
Cash 325,943.04
Accounts and Bills Receivable 4,619,681.97

Total Assets\$28,893,777.12

Liabilities.

Capital Stock\$3,600,000.00
6% Debenture Gold Bonds maturing Jan. 1, 1922\$1,000,000.00
Less Bonds in Treasury. 250,000.00
\$750,000.00
6% Debenture Gold Bonds maturing Oct. 1, 1927 to 1931..... 1,000,000.00
1,750,000.00

Unclaimed Dividends and Bond Interest 32,513.10
Accrued Interest on Bonds to Nov. 30, 1917 28,750.00
Paid in Surplus 1,050,000.00
Reserve for Excess Profits and Federal Income Taxes 3,005,640.41
Other Reserve Funds 3,152,496.70
Accounts and Bills Payable 9,477,011.13

Total Liabilities\$22,096,411.34

Surplus November 30th, 1917 \$6,797,365.78

Respectfully submitted,

THOMAS J. MALONEY,
Treasurer.

PLAINTIFF'S EXHIBIT 12.

Balance Sheet, Botany Worsted Mills, Passaic, N. J.

November 30, 1918.

Assets.		Liabilities.	
Real Estate		Capital Stock	\$3,600,000.00
Buildings, Mill Buildings, Dwellings,		Debtenture Gold Bond Issues:	
Filter Plant	\$513,571.71	Issue due January 1, 1922	\$1,000,000.00
Machinery and Equipment	3,598,040.88	Issue due October 1, 1927-1931	1,000,000.00
Furniture and Utensils	4,836,596.53		
Automobiles	15,000.00		
Cash:	7,500.00		
At Mill	\$74,494.34		
In Banks	1,035,076.01		
War Savings & Thrift Stamps for Dis-		Less Bonds in Treas-	\$2,000,000.00
tribution	1,109,570.35	ury	287,500.00
Stocks and Bonds:	1,255.39	Special Reserve in accordance with By-	1,712,500.00
1st Liberty Loan	90,000.00	laws, etc.	1,050,000.00
2nd "	185,000.00	Reserve for Pensions	200,000.00
3rd "	500,000.00	Reserve for Depreciation	
4th "	1,500,000.00	on Buildings, Machin-	
		ery, & Fixtures	\$2,977,053.82
		Added for year ending	
Others	\$2,275,000.00	Nov. 30/18	421,731.87
	44,000.00		
Suspense Account:		Reserve for War Profits & Income Taxes	3,398,785.69
Claims for low yield of Wool &		Deferred Compensation to Board of Di-	*4,681,342.19
Transportation claims	236,757.76	rectors for year ending November 30,	
		1917	74,743.16

FOLD*OUTS ARE TOO LARGE TO BE FILMED

FOLD-OUTS ARE TOO LARGE TO BE FILMED

402 The following are the defendants' exhibits:

403 DEFENDANTS' EXHIBIT "A."

Agreement of Copartnership of Stoehr & Sons.

Agreement made as of May 1, 1913, between Kommerzienrat Eduard Stoehr, of Rietzmeck a/d Elbe, Germany, (first party), Hans E. Stoehr, of New York City, (second party), Georg Stoehr of Leipzig, Germany, (third party) and Max Wilhelm Stoehr of Passaic, New Jersey, (fourth party), witnesseth as follows:

First.

The first three parties above-named have been co-partners since May 1, 1913, and do hereby agree to continue the said co-partnership and further agree to take in the fourth party as a partner. The terms of said co-partnership shall be as hereinafter set forth:

Second.

(a). Name of the Co-partnership.—Its name shall be Stoehr & Sons.

(b). Place of Business.—Its principal place of business and main office shall be in New York City, State of New York, under the laws of which state this agreement is made; all questions arising as to the co-partnership or as to the rights, duties or obligations of its members or as to this agreement shall be determined by the laws of said state.

(c). Duration.—This agreement and the co-partnership shall continue for three (3) years from May 1, 1913, to wit: until the first day of May, 1916. In the event that written notice of his desire to terminate the contract shall not be given by one or more of the parties at least one (1) year prior to said last mentioned date, then the co-partnership shall continue for a further year after May 1st,
404 1916 and thereafter from year to year subject only to the right of any partner to give a year's notice of termination which notice shall then be effective upon the 1st day of May of the following year.

(d). Fiscal Year.—The fiscal year shall begin on the 1st day of May and end on the 30th day of April of each year.

Third.

Purposes of the Copartnership.

The copartnership shall do a general mercantile and commission business, engage in the purchase, lease or sale of real or other property including the purchase and sale of shares of stocks and other

securities as well as of goods and merchandise, may own any of such shares or property, participate in industrial enterprises, purchase, lease and sell and be interested in textile and other factories, and dispose of the output of such factories;—in general it is the purpose of the co-partnership to promote the interests of the partners and of their families by consolidating various property interests and to manage said property interests through this copartnership.

Fourth.

Active and Silent Partners.

Kommerzienrat Eduard Stoehr (the first party) and Hans E. Stoehr (the second party) shall be the active partners and Georg Stoehr (the third party) and Max Wilhelm Stoehr (the fourth party) shall be the silent or passive partners. The active partners shall have the sole charge and the conduct of the business, shall represent the co-partnership, shall have the sole right to make and sign contracts or other papers relating to the affairs of the co-partnership or to incur any liability in its behalf. The silent or passive
405 partners shall not, without the written consent of the active partners, participate in the conduct of the business or represent the copartnership or sign or incur any liability in its behalf. The active partners shall have the right to conduct the business in such manner as they may think best except that no transaction involving a value of more than \$25,000 shall be consummated without the written consent of all the partners.

Fifth.

Voting Control.

In the determination of any question relating to the copartnership, the first party shall have four (4) votes; the second party shall have two (2) votes and the third and fourth parties shall each have one (1) vote. In the event that the active partners shall not agree upon any proposition or matter relating to the business, then the question shall be presented for determination to all the partners and the majority vote of all the partners shall be decisive of any such question. In case of the death of any of the partners the voting shall thereafter be on the basis of and in proportion to the capital contribution of each partner as fixed in paragraph "Sixth" hereof.

Sixth.

Capital and Distribution of Profits.

(a). Each partner has contributed the following capital:

Kommerzienrat Eduard Stoehr (the first party)	\$420,000
Hans E. Stoehr (the second party)	80,000
Georg Stoehr (the third party)	50,000
Max Wilhelm Stoehr (the fourth party)	10,000
Total	<u>\$560,000</u>

406 There shall be no change without the consent of all the partners in the relative proportion of capital contributed as above set forth; in the event that any partner contributes additional sums or property or allows his profits to stand on the books of the co-partnership he shall be entitled to interest at the rate of six (6) per cent but such sums or property shall be kept as separate credits on the books without changing the amount of the capital contributed by him.

(b). The profits arising from the business shall be distributed among the parties as follows:

To the first party \$2,000 annually; to the second party \$5,000 annually;—which said sum of \$7,000 shall be in payment of their services as active partners. The balance of the profits shall be divided among all the partners in proportion to the amount of their contribution of capital as above stated. The profits shall be determined annually at the close of the fiscal year by inventory and by the closing of the books as is customary and usual among merchants. In the event that the business shows a loss such loss shall be borne in the same proportion in which the profits are divided.

Seventh.

Continuance in Case of Death.

In the event of the death of any of the co-partners the partnership shall not cease but shall continue; the survivors in such event shall have the right to continue the business, to use the firm name and to take over the name, good will and all other property of the co-partnership (it being agreed that in case of such death, his legal representatives shall have the same right to a specific distribution of any shares of stock owned by the co-partnership as is provided in case of dissolution in Paragraph Eighth hereof) and such survivors shall assume all the liabilities of the firm. By the unanimous consent of all the survivors, the legal representatives of the deceased may be taken into the copartnership. In the event

407 that such unanimous consent is not given or that for any

other reason the legal representatives of the deceased do not become members of the copartnership then the estate of the deceased shall be entitled to the sum shown by the last annual balance as the share of the deceased in the copartnership with interest thereon (if interest has been earned since said last annual balance) and upon payment of said sum with such interest, either in cash or in specie by the distribution of shares of stock, the estate of said deceased shall have no further claim to any of the property, good will or other assets of the copartnership. Each partner agrees to make testamentary provision enabling his legal representatives to enter the copartnership in the place of the testator.

Eighth.

Dissolution.

In the event of the dissolution of the co-partnership an inventory shall be taken and an account shall be stated between the partners, and the balance shown on the books of the copartnership shall be distributed in the proportion of the contribution of each partner to the capital of the copartnership as then shown on the books. In the event that at the time of such dissolution the copartnership shall own shares of stock in any corporation, then the proportional amount of such shares of stock to which each partner or his estate may be entitled shall not be sold without his consent but shall be specifically distributed and transferred to him or to his estate if he or his estate so elects; it being the intention that in the event of the dissolution of the said copartnership the liquidation of its affairs shall as
408 far as possible be conducted by specifically distributing any shares of stock owned by the copartnership to each of the partners in proportion to the amount of their respective contribution to the capital of the co-partnership. In the event that for the purpose of said distribution it should be necessary to place a value upon any stock so to be specifically distributed and the partners or the survivors of them cannot agree among themselves as to the same, then the value to be placed upon such stock at the time of said distribution shall be the price at which the stock shall have been taken over by the copartnership or if it has been purchased by the copartnership at the cost price thereof.

Ninth.

Miscellaneous Provisions.

(a). Voting Power on Shares of Stock.—The voting power on all shares of stock in European corporations owned by the copartnership shall be exercised by the first party who shall have a proxy for that purpose with power of substitution. The voting power on all shares of stock in American corporations owned by the copartnership shall be exercised by the second party who shall have a proxy for that purpose with power of substitution. The proxies and powers of at-

torney hereby conferred may be cancelled or the method of the exercise of same may be changed at any time by a majority vote of the partners. It is further agreed that any of the partners or any other persons may be designated at any time as proxies and given the right to vote on any of the shares of stock herein mentioned provided the majority of the partners so determine.

409 (b). The partners agree that during the continuance of the contract no part of the capital contributed by any of them shall be withdrawn but that the same shall remain in the firm at the amount hereinbefore specified.

(c). On all calculations among the partners a dollar shall be figured at Four marks 20 pf.

In witness whereof the parties hereto have set their hands and seals as of the date and year above mentioned.

(Sgd.)

HANS E. STOEHR.

(Sgd.)

GEORG STOEHR.

(Sgd.)

MAX W. STÖHR.

In the presence of:

(Sgd.) HERBERT A. HEYN.

(Sgd.) HERBERT A. HEYN.

(Sgd.) HERBERT A. HEYN.

[Endorsed:] Kommerzienrat Eduard Stoehr, Hans E. Stoehr, Georg Stoehr and Max Wilhelm Stoehr. Agreement of Copartnership of Stoehr & Sons. Heyn & Covington, Counsellors at law, 60 Wall Street, New York City.

410

DEFENDANTS' EXHIBIT B.

One Hundred and Thirty-five
Central Park West,
New York City.

October 21, 1918.

James N. Wallace, Esq.,
President Stoehr & Sons, Inc.,
54 Wall Street,
New York City.

DEAR SIR:

I am sorry that the invitation to the last meeting of the Board of Directors of Stoehr & Sons, Inc., did not reach me in time to attend the meeting.

As I have been informed by Messrs. Davies, Auerbach & Cornell, attorneys for the estate of the late Mr. E. H. Stoehr, of which I am executor, that matters of vital importance have been acted upon, I would thank you, if you would arrange to have a copy of the minutes

of such meeting sent to me, so that I may be advised about the business that came before the Board at that time.

I would also thank you, if you would, in future, arrange to have all communications addressed to me as above.

Very truly yours,
(Signed)

MAX W. STOEHR.

411 DEFENDANTS' EXHIBIT C.

October 22, 1918.

Stoehr & Sons, Inc.

Mr. Max W. Stoehr,
135 Central Park West,
New York City.

DEAR SIR:

Mr. Wallace forwarded me your letter of October 21st to him.

At the last meeting of the Board of Directors of Stoehr & Sons, Inc., held October 16, 1918, your resignation as a director was presented and accepted by the Board, as also your resignation as Secretary of the Company.

I enclose you with this a copy of the minutes of that meeting.

Yours very truly,

JOHN QUINN.

412 DEFENDANTS' EXHIBIT D.

135 Central Park West,
New York, October 25, 1918.

John Quinn, Esq.,
31 Nassau Street,
New York City.

DEAR SIR:

I received your letter dated October 22nd this morning, with the enclosure, and I thank you for the same.

Very truly yours,
(Sgd.)

MAX W. STOEHR.

413 DEFENDANTS' EXHIBIT E.

Stoehr & Sons, Inc.

Waiver of Notice of Meeting of the Board of Directors of Stoehr & Sons, Inc.

We, the undersigned, being all the directors of the above named Company, do hereby waive notice of the time, place and object of holding a meeting of the Board of Directors of said Company, and

do hereby appoint the office of the Company No. 200 Fifth Avenue, Borough of Manhattan, City of New York, as the place, and April 5th, 1917, at three o'clock p. m. as the time of holding the said meeting, and do hereby consent to and ratify any and all action of the Board of Directors taken at said meeting.

Dated New York, April 5th, 1917.

HANS E. STOEHR.
GEORGE G. RÖHLIG.
MAX W. STÖHR.
ALFRED DE LIAGRE.

Minutes of Meeting of the Board of Directors of Stoehr & Sons, Inc.

A meeting of the Board of Directors of the above named Company was held on the 5th day of April, 1917, at three o'clock p. m. at the office of the Company, No. 200 Fifth Avenue, in the Borough of Manhattan, City of New York, pursuant to a written waiver of notice signed by all the directors fixing said time and place.

The following directors were present:

Messrs. Hans E. Stoehr, Max W. Stoehr, Alfred de Liagre, Georg G. Röhlig, constituting the entire Board of Directors.

Mr. Hans E. Stoehr presided and Mr. Max W. Stöhr acted as Secretary of the meeting.

The secretary presented and read a waiver of notice of the meeting signed by all of the directors which was ordered filed in this minute book.

The minutes of the meeting of the Board of Directors held on February 20, 1917, were read and approved.

The matter of the salaries of the president and treasurer were brought before the meeting, and the same were discussed by the meeting.

Upon motion duly made, seconded and carried the following resolution in reference to the salary of the president was thereupon unanimously adopted (Mr. Hans E. Stoehr not voting and taking no part):

Resolved, that the salary of the president shall consist of a fixed sum and a commission or percentage of the profits of the Company; the fixed sum shall be \$24,000 per annum, payable monthly and

the commission shall be six (6%) per cent. of the profits of
415 the Company; such commission or percentage shall be computed at stated times, but at least every six months, and to be credited to his account, and shall be charged as an expense of the business. This commission or percentage shall, however, only be payable in the event that the Company shall earn and pay a dividend on its capital stock of at least six (6%) per cent. per annum.

Upon motion, duly made, seconded and carried, the following resolution in reference to the salary of the treasurer was thereupon unanimously adopted (Mr. Max W. Stöhr not voting and taking no part):

Resolved, that the salary of the treasurer shall consist of a fixed sum and a commission or percentage of the profits of the Company; the fixed sum shall be \$18,000 per annum, payable monthly, and the commission shall be five (5%) per cent. of the profits of the Company; such commission shall be computed at stated times, but at least every six months and shall be credited to his account and shall be charged as an expense of the business. This commission or percentage shall, however, only be payable in the event that the Company shall earn and pay a dividend on its capital stock of at least six (6%) per cent. per annum.

Upon motion duly made, seconded and carried it was

Resolved, that no other officer or director of the Company shall receive any salary or compensation until the further order of the Board of Directors.

Upon motion duly made, seconded and carried the following amendment to the by-laws was unanimously adopted:

To add Section IVa of Miscellaneous reading as follows:

"The President or the treasurer and each of them is authorized to open any bank account, make any deposit, draw on the funds of the Company or transact any business with any bank, trust company, or bankers, and to sign, endorse, transfer, accept, make, execute or deliver any checks (including checks drawn to the individual order of either of said officers), warehouse receipts, bills of lading or bills of exchange, notes, drafts, acceptances and any other evidences of indebtedness or contracts, and no resolution of the Board of Directors shall be required as authority to either of said officers for any of said purposes."

There being no further business before the meeting the same thereupon adjourned.

MAX W. STOHR,

Secretary.

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DEFENDANTS' EXHIBIT F.

Heyn & Covington,
60 Wall Street,
New York.

February 9, 1918.

Alien Property Custodian,
Division of Corporations,
16th & P Sts., N.W.,
Washington, D. C.

Attention of Judge J. Davis Brodhead and Mr. Andrew B. Duvall.

Botany Worsted Mills.

Stoehr & Sons, Inc.

GENTLEMEN:

At the conclusion of our conferences last Wednesday, February 6th, 1918, it was arranged that we put in written and summary form the various facts and statements made and hereby take pleasure in doing so.

As to Where the Control of These Companies Is.

As will be pointed out hereafter more in detail and as stated by us in our various conferences, considerably more than a majority control of these companies is in alien enemies under the act. The exact figures and stockholdings are stated more at length below.

Botany Worsted Mills of Passaic, N. J.

The Botany Worsted Mills was organized in 1889 under the laws of the State of New Jersey. It was founded by Mr. Eduard Stoehr of Leipzig, Germany, who is the head of the Stoehr family. He was also the founder of Stoehr & Co., a German corporation, which had been organized in 1880 and was engaged in Leipzig, Germany, in the manufacture of yarns and textile goods.

By-laws and Certificate of Incorporation.

We submit herewith a certificate of incorporation of the Botany Worsted Mills; also a copy of its by-laws which have been substantially in this form since its organization, with various amendments as to details, the last amendment having been made in 1913.

Capital Stock of Botany Worsted Mills.

Present amount \$3,600,000., all common stock, consisting of 36,000 shares; par value \$100. each. There have been various in-

creases of the original capital stock (which was \$1,100,000) since the organization in 1889, the last increase to the present amount having taken place in 1908.

418 Botany Worsted Mills is engaged in the manufacture of worsted woolen and other yarn and textile goods. Its plant is situated in Passaic, New Jersey and the Company has about 6,500 employees.

Number of Directors.

The by-laws provide that the number of directors shall not be less than seven nor more than eleven (by-laws, Article V, par. 2). The number of directors for any year is determined by the stockholders at their annual meeting (by-laws, Article V, par. 2). At the March, 1917 meeting they determined that there should be 10 directors. At the present time there are eight directors, whose names, residences, positions which they now occupy in the Company and the length of time of their connection with the Company are as follows:

Present Board of Directors (8 Directors, with 2 Vacancies).

Thomas Prehn, of Passaic, New Jersey, president, connected with the Company since 1889.

Hans E. Stochr, of New York City, treasurer, connected with the Company since 1902.

Ferdinand Kuhn, of Bernardsville, New Jersey, vice president, connected with the Company since 1891.

Geo. E. Roehlig, of Passaic, New Jersey, superintendent and vice treasurer, connected with the Company since 1889.

Max W. Stochr, of Passaic, New Jersey, secretary, connected with the Company since 1903.

Alfred de Liagre, of New York City, executive head of New York office and of the general sales department, connected with the Company since 1903.

Otto Kuhn, of Passaic, New Jersey, head of the woolen department, connected with the Company since 1905.

Camille Mehl, of Passaic, New Jersey, head of the yarn department, connected with the Company since 1915.

Unusual Nature of the Directorship of This Company.

The nature of the directorship of the Company has from the date of its organization been exceptional and different from that of most American companies in that this Company's Directors are actively engaged in the business and occupy responsible positions as officers and heads of departments. This has been the policy of the

419 Company from the date of its organization, it being the purpose of the founder, Mr. Eduard Stochr, that the directors should be real directors actually and personally interested in the business and giving their time and attention to it. The reward of

the directors for the success of their work was to be accordingly. It will be noted that the directors in accordance with the provision of the by-laws receive as their compensation a sum equal to 32% of the profits after deducting a 6% dividend to the stockholders and 5% for reserve (Article 21, par. B, page 15). This provision of the by-laws has been in force with immaterial variations from the date of the organization of the Company in 1889. The variations relate to the percentage which was 25%, later 40% and then 32%.

It will be noted that there are now two vacancies in the Board. At the annual meeting in March, 1917, ten directors were elected, being the gentlemen above mentioned and Eduard Stochr of Leipzig, Germany, and Geo. Stochr, of Leipzig, Germany. In the spring of 1917 after the declaration of war, the Board pursuant to Article V, par. 6 of the by-laws, declared two directorships vacant because of the disability of Eduard Stochr and Geo. Stochr, due to the state of war and said vacancies have not been filled.

It will also be noted that all of the present directors and officers are residents of the United States.

Annual Meeting of Botany.

The annual meeting of the stockholders of the Company is held on the third Tuesday of March (Article XIII, par. 1 of the by-laws), the next annual meeting taking place on March 19, 1918.

Stochr & Sons, Inc., New York City.

This is a New York corporation, organized in February, 1917, which is the successor to Stochr & Sons, a partnership in New York City, which consisted of Eduard Stochr, of Leipzig, Germany, and his three sons, H. E. Stochr, of New York City, M. W. Stochr, of Passaic, New Jersey, and Geo. Stochr, of Leipzig, Germany.

Certificate of Incorporation and By-laws.

A copy of the certificate of incorporation and of the by-laws of this Company are submitted herewith.

Capital Stock of Stochr & Sons, Inc.

420 Amount \$250,000, consisting of 2,500 shares, par value \$100 each.

The business of the Company—like that of its predecessor, the partnership of Stochr & Sons—is dealing in wool; part of its funds were used to help finance the operations of Botany and it also made investments in other American enterprises.

The immediate occasion for the organization of the corporation in February, 1917, was this: It was assumed that if there was a declaration of war between the United States and Germany, the partnership would probably have to cease, being dissolved by reason of the alien enemy character of Eduard Stochr, the father, and Geo.

Stoehr, the brother, the results of such dissolution being of course obviously unfortunate and conceivably disastrous.

The partners retained the same proportional interest in the corporation as their interest in the partnership, namely, Eduard Stoehr, the father, 1,875 shares, Geo. Stoehr, the brother, 222.21 shares being represented by trust certificates held by M. W. Stoehr for his father and brother)—in other words somewhat more than 4/5ths interest in parties resident in Germany.

Officers and Directors of Stoehr & Sons, Inc.

The certificate of incorporation and by-laws of the company provide for four directors. They are as follows:

Hans E. Stoehr, President,
Geo. E. Roehlig, Vice President,
Max W. Stoehr, Secretary and Treasurer,
Alfred de Liagre, Asst. Secretary and Asst. Treasurer.

It will be noted that these directors and officers are the same gentlemen mentioned above as directors and officers etc. of Botany Worsted Mills and that all of them are residents of the United States.

As has been pointed out, the founder of the Botany Worsted Mills was Eduard Stoehr. As he is advanced in age (being 72 years) most of the active work during the past years has devolved on his sons. In this connection it may be stated generally that Eduard Stoehr, the father, and Geo. Stoehr, the brother, were in charge of the Stoehr interests in Germany, and H. E. Stoehr and M. W. Stoehr of the interests in the United States. H. E. Stoehr represented his father and also Stoehr & Company, the Leipzig corporation, in this country.

421 Stoehr & Co., the Leipzig corporation, is a German stock company with its plant near Leipzig, Germany. Eduard Stoehr occupied a position similar to that of a chairman of the Board of Directors and Geo. Stoehr the position of Chief executive officer similar to president.

In February, 1917, the Board of Directors of Stoehr & Co. consisted of five members, viz: Eduard Stoehr, Hans E. Stoehr, Dr. Essenthal, Paul Gulden and Carl Beckmann.

Details as to Stock Control of Botany Worsted Mills.

The following will show the stockholdings in Botany Worsted Mills:

Shares of 84 Alien Enemy Stockholders referred to in the list report made to the Alien Property Custodian by Botany Worsted Mills, Form No. 101, report No. 5263 (see typewritten list, Schedule 2, showing 10,700 shares in names of alien enemy stockholders from which are to be deducted 1,205 shares referred to as having been purchased and paid for in 1916 by stockholders resident in U. S.)

These 1,205 shares were bought and paid for in 1916 by stockholders residents in the United States. But on account of interrupted communication the particulars as to the numbers of the certificates and the names of stockholders are incomplete (see report No. 5263, last page of Schedule 2).

The above mentioned 9,495 shares include 2,900 shares of George Hirsch, of Gera, Germany, standing in the name of Thomas Prehn (see report made by Thomas Prehn to the Alien Property Custodian. The report number and trust number of this report we do not know).

The above 9,495 shares also include 1,400 shares of Friedrich Arnold, of Greiz, Germany, standing in the name of Thomas Prehn. (see report by Thomas Prehn, No. 3052, trust No. 468).

Shares referred to in report No. 5263 (see last paragraph of typewritten list of Schedule 2, and also report No. 1869, trust No. 4017, Schedule 12, and a copy of contract annexed thereto. See also Schedule 2, last paragraph and Schedule 4 of report No. 5263). These shares were in the name of H. E. Stoechr and M. W. Stoechr, as trustees for said Stoechr & Co., the Leipzig corporation, the beneficial interest being in Stoechr & Co.

14,900

Regarding the contract for the purchase of said 14,900 shares by Stoechr & Sons Inc., from Stoechr & Co., of Leipzig, Germany, it has been fully explained that the control of Botany might be imperiled by a state of war, because the voting right on stock of alien enemies or in which alien enemies had the beneficial interests (as was the case with said 14,900 shares) was doubtful under the decisions of the courts, and if deprived of the voting right, the control of Botany might be lost. This contract was made with reference to the control of Botany as between its stockholders and had of course no reference to the status of such control so far as the Alien Property Custodian is concerned. Such status is not affected whether such shares are in Stoechr & Co. the Leipzig corporation or in Stoechr & Sons Inc. the New York corporation. As we also stated verbally there have been no resolutions or other corporate action by Stoechr & Co., the Leipzig corporation, in confirmation of this transaction.

Additional shares belonging to Stoechr & Sons Inc. the New York corporation.....

5,685

Other stockholders in the United States, including the 1,205 shares referred to above.....

5,920

Total stock of Botany.....

36,000

To summarize: While Botany is managed in this country, considerably more than a majority of its stock is controlled by alien

enemy interests within the meaning of the Alien Enemy Act; the total of the stock thus controlled (directly and indirectly) being 10,000 shares.

In accordance with the suggestion of Judge Brodhead and Mr. Duvall, we have stated in the foregoing letter the substance of the information verbally stated by us and contained in the reports made to the Alien Property Custodian. Of course, if any further information is desired we shall be glad to furnish it.

As to Further Conference.

We refer to the suggestion made by Judge Brodhead at our last interview regarding a future conference and shall be pleased to hear from you as to what date will be convenient to your office.

As to the Executive Committee.

In addition to the foregoing may we take the liberty of calling your attention to Article XXIII of the bylaws of Botany (last page)

423 which provides for an executive committee? Through this committee effective control may be exercised over the affairs of Botany. The number of its members could, if desired, be reduced to three and its powers extended and such other appropriate restrictions adopted as may be deemed advisable.

Yours very truly,

(Sgd.)

HEYNS & COVINGTON,

Counsel.

Enclosures 4.

Alien Property Custodian. Received Feb. 11, 1918. Noted
Date —, Ans'd. —, Date —, Report No. —,
Trust No. —.

424 DEFENDANTS' EXHIBIT G

was a carbon copy from the office of Heyns & Covington of Plaintiff's Exhibit F with the following original signatures at the foot thereof:

"The foregoing approved.

BOTANY WORSTED MILLS.
By HANS E. STOEHR,
Treas.
STOEHR & SONS, INC.,
By HANS E. STOEHR,
Pres.

Defendants' Exhibit G contained the receipt of the New York Postmaster in the customary form of a registered letter enclosing the original of Defendants' Exhibit F, and also the registered return receipt from the Alien Property Custodian reading as follows:

Alien Property Custodian. Received Feb. 11, 1918. Noted
 ———. Date ———. Ansd. ———. Date ———. Report No. ———.
 Trust No. ———.

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DEFENDANTS' EXHIBIT H.

Stoehr & Sons, Inc.,
 200 Fifth Avenue,
 New York City.

February 5, 1918.

Cable: Stoehrsons, New York.

Herbert A. Heyn, Esq.,
 Hotel Raleigh,
 Washington, D. C.

DEAR SIR:

I herewith wish to state that the majority of the stock of the Botany Worsted Mills, Passaic, N. J., and of Stoehr & Sons Inc., New York, is held by parties who are "Alien Enemies" under the "Trading with the Enemy Act".

This information is given by me as Treasurer of the Botany Worsted Mills, and as President of Stoehr & Sons Inc.

Yours very truly,
 (Sgd.)

HANS E. STOEHR.

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DEFENDANT'S EXHIBIT I.

No. 2.

357.14/100 shares.

Trust Receipt or Certificate.

Stoehr & Sons. Inc.

This is to certify that as hereinafter provided Hans E. Stoehr will be entitled to receive a Certificate or Certificates for Three Hundred & fifty-seven & 14/100 fully paid shares of the par value of One hundred dollars each, in Common Stock of Stoehr & Sons, Inc., on February 19, 1922, and in the meantime to receive payments equal to the dividends, if any, collected by the undersigned Voting Trustees upon a like number of shares of such Common Stock standing in their names. And until the 19th day of February, 1922, the Voting Trustees shall possess and be entitled to exercise all rights of every name and nature, including the right to vote in respect of any and all such stock; it being expressly stipulated that no voting right passes to the holder hereof by or under this Certificate, or by or under any agreement, express or implied.

This Certificate is issued pursuant to the terms of an agreement in writing, dated the 19th day of February, 1917, and entered into between all stockholders of said Company and said Voting Trustees.

This Certificate is transferable only on the books which shall be kept for that purpose by said Voting Trustees, by the registered

holder, either in person or by attorney, duly authorized, according to rules which shall be established for that purpose by said voting Trustees, and on surrender hereof and until so transferred, the said Voting Trustees may treat the registered holder as owner hereof for all purposes whatsoever, except that the delivery of such Certificates hereunder shall not be made without the surrender hereof.

This Certificate is not valid unless signed by the Voting Trustees.

In witness whereof said Voting Trustees have caused this Certificate to be signed this 19th day February, 1917.

HANS E. STOEHR,
MAX W. STÖHR,
GEORG G. RÖHLIG,
Voting Trustees.

Endorsed.

For value received I hereby sell, assign and transfer unto ———, all — right, title and interest represented by the within Stock Trust Certificate, and do hereby irrevocably constitute and appoint ———, Attorney to transfer the said Certificate on the books of the within named Voting Trustees, with full power of substitution in the premises.

Dated, the 13th day of July, 1917.

HANS E. STOEHR. [L. S.]

In the presence of:

MAX W. STÖHR.

\$2.40 revenue stamps cancelled.

NOTICE.—The signature to this assignment must correspond with the name as written upon the face of the Certificate, in every particular, without alteration or enlargement or any change whatever.

427 DEFENDANTS' EXHIBIT J

consisted of the by-laws of the Botany Worsted Mills as amended, which were in force during the period covered by the transactions in this case and down to the time of the adoption, July 30, 1918, of the amended by-laws of the Botany Worsted Mills, Defendants' Exhibit A-1, and consisted of 23 articles. Article 1 fixed the name of the company; Article 2 the object of the company. Article 3 its place of business. Article 4 fixed the capital stock at \$3,600,000 divided into 36,000 shares of the par value of \$100 each to be issued in certificates of five (5) shares each. Article 5 contained seven paragraphs defining the duties of officers. Article 6 defined the duties of the President and Vice-Presidents. Article 7 prescribed the duties of the Treasurer and Vice-Treasurer and provided that the Treasurer should countersign all certificates of stock and have the care and custody of all the funds of the company and should deposit the same

in such bank or banks as he and the President might select, and was empowered "to buy and sell material and merchandise and to take general charge of the business; to sign all checks, drafts, notes and orders for the payment of money." Article 8 prescribed the duties of the Superintendent. Article 9 prescribed the duties of the Secretary. Article 10 fixed the number of the directors and prescribed the duties of directors. Article 11 fixed the business year to commence on the first day of December in each year and end on the 30th day of November of the following year. Article 12 related to directors and their meetings, both regular and special. Article 13 was as follows:

"Article XIII.

Meetings of Stockholders.

"Par. 1. An annual meeting of the Stockholders of the Company shall be held on the third Tuesday of March of each year at 12 o'clock noon for the election of new Directors and other business.

"Par. 2. The President, or either of the Vice-Presidents, or in their absence a chairman elected by a majority vote of the stockholders present or represented by proxy, shall preside at these meetings. A Judge of election shall be chosen by a majority vote of those present, who shall hold the election; but no person who is a candidate for the office of Director shall act as judge of election for Directors of the Company; and in case any person so acting at or conducting any election shall be elected a director, his election shall be void, and it shall not be lawful for Directors for the time being to appoint such person to the office of Director of the Company within 12 months next succeeding such election.

"Par. 3. A special meeting of the stockholders shall be called by the President or either of the Vice-Presidents at the request of the Treasurer or Vice-Treasurer or of a majority of the Board of Directors, or of a majority in interest of the stockholders signed by such stockholders or their legal representatives and stating the object of the proposed meeting. The Secretary shall give or mail at least four weeks' written notice to all stockholders or their duly appointed representatives at their residences as they appear on the books of the Company, and such notice shall state the business for which the meeting was called, and no other business than as stated therein shall be transacted at such meeting.

"Par. 4. The poll at every election shall be opened between the hours of 9 o'clock in the morning and 5 o'clock in the afternoon, and shall continue open at least one hour by daylight, and shall close before 9 o'clock in the evening."

Article 14 related to the place of meetings of stockholders
428 and of directors. Article 15 fixed the quorum of stockholders for the alteration or addition to the by-laws by the stockholders. Article 16 related to the repeal, alteration, amendment or

addition to the by-laws by the stockholders and the board of directors. Article 17 was as follows:

"Article XVII.

Stockholders and Elections.

"Par. 1. Each stockholder shall be entitled to a certificate of his stock, but only in blocks of five shares under the seal of the corporation, signed by its President or either of the Vice-Presidents, and countersigned by its Treasurer. Each share of stock represented at any meeting of the stockholders shall entitle the holder thereof registered on the books of the Company to one vote.

"Par. 2. No stockholder shall be entitled to vote at any election, or at any meeting of the stockholders, on whose share or shares any installments or arrearages may have been due and unpaid for the period of thirty days immediately preceding such election or meeting.

"Par. 3. At all meetings absent stockholders may vote by proxy authorized by a writing executed by the owner of shares. The President or other chairman of the meeting, and in case of an election, the judge of election, shall judge the sufficiency of the powers of attorney produced, but no proxy shall be voted on, allowed or received for more than three years from its date.

"Proxies shall only be given to shareholders of the Company.

"No share of stock shall be voted on at an election, which has been transferred on the books of the Company within twenty days preceding such election.

"Par. 4. Every person holding stock as executor, administrator, guardian, or trustee, shall represent the stock in his hands at all meetings of the Company and may vote accordingly as a stockholder; and every person who shall pledge his stock as collateral security, may, nevertheless, represent the same at all such meetings, and may vote accordingly as a stockholder.

"Par. 5. The Board of Directors shall produce at the time and place of election during the whole time while such election shall be open, a full, true and complete list of all the stockholders of the company entitled to vote at such election, with the number of shares held by each; which list shall be arranged in alphabetical order and subject to the inspection of any stockholder who may be present at such election; and upon the neglect or refusal of said Directors or managers to produce said list at any election of the Company, they shall be ineligible to any office at such election."

Article 18 was as follows:

Article XVIII.

Transfer of Shares.

"Transfer of shares, so as to entitle the holder to be recognized as owner by the Company, shall only be made upon the books of the Company by the holder or owner in person or by power of attorney. For the convenience of the European shareholders such transfer may be accomplished in the following manner: The certificates may be deposited, properly endorsed, with the Vice-Treasurer at Leipzig, or with any Director resident at Leipzig, who is to certify such transfer or assignment to the Treasurer at the principal office of the Company and the Treasurer shall thereupon note such transfer upon the share-book of the company and advise the Vice-Treasurer or such Director at Leipzig of the transfer so made. It shall be the duty of the Vice-Treasurer or such Director resident at Leipzig to retain the certificate deposited with him, until he shall be advised by the Treasurer of the completed transfer."

429 Article 19 related to the substitution of certificates that had been lost, stolen or destroyed. Article 20 related to dividends. Article 21 related to the distribution of the profits of the Company. Article 22 provided for the seal of the company. Article 23 provided for an Executive Committee and fixed its quorum and powers.

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DEFENDANT'S EXHIBIT K.

For Directors of the Botany Worsted Mills.

April 2, 1918.

Mr. Thomas Prehn.

Mr. Ferdinand Kuhn.

Mr. Georg Röhlig.

Mr. Max W. Stoehr.

Max W. Stoehr, Proxy for Stoehr & Sons, Inc., 20,550 sh.

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DEFENDANTS' EXHIBIT L.

Division of Corporations.

January 30th, 1918.

Re Trust No. 4017—Report No. 1869.
“ “ 12118— “ “ 5263.

Messrs. Stoehr & Sons, Incorporated,
#200 Fifth Avenue,
New York City.

GENTLEMEN:

The reports made by your Company pursuant to the provisions of Section 7 (a) of the "Trading with the enemy act" as well as the several reports made by the Botany Worsted Mills and Mr. M. W. Stoehr are now receiving our consideration.

Before taking further steps in connection with these reports, we desire to secure additional information concerning the matters hereinafter referred to, to wit:

1. The Report of Stoehr & Sons, Inc., of New York makes reference to a certain contract dated February 20th, 1917, wherein Stoehr & Company, of Leipzig, Germany, agree to sell to Stoehr & Sons, Inc., of New York, 14,900 shares of the capital stock of the Botany Worsted Mills, and the paper writing purporting to be a copy of said contract is attached to and made a part of said report.

In connection with this report, we request that you submit for our inspection and furnish full information on the following:

(a). The certificate of incorporation and by-laws of Stoehr & Sons, Inc., of New York.

(b). Copy of the certificate of charter, the by-laws, list of officers and directors of Stoehr & Company, of Leipzig, Germany.

(c). Certified copy of the minutes of the action taken by Stoehr & Company, of Leipzig, Germany, with reference to the sale of the 14,900 shares of capital stock of the Botany Worsted Mills to Stoehr & Sons, Inc., of New York; and any paper writing authorizing the execution of said contract by H. E. Stoehr on behalf of Stoehr & Company, of Leipzig, Germany.

432 (d). The powers of attorney or other written authority whereby on February 3rd, 1917, H. E. Stoehr and M. W. Stoehr held respectively 10,000 shares and 4,900 shares of the capital stock of the Botany Worsted Mills, as Trustee, for Stoehr & Company, of Leipzig, Germany. Also the written authority, if any, revoking the powers of attorney to said H. E. Stoehr and M. W. Stoehr.

2. The report of the Botany Worsted Mills giving the list of stockholders states that 1,205 shares of the total 10,710 shares now registered in the names of enemies residing in Germany and Austria were bought in the year 1916 by stockholders resident in the United States; that the Company has proof said shares were actually bought and paid for by said resident stockholders, although none of the certificates therefor are in this country and the Company cannot state from which of the resident stockholders the shares were purchased. We desire to be furnished with satisfactory proof respecting the transfer of title to said 1,205 shares of stock and the names of the alleged purchasers thereof. We also wish to inspect the certificate of incorporation and by-laws of the Botany Worsted Mills, and be furnished with a list of the present officers and directors.

3. The report of the Botany Worsted Mills "unpaid dividend accounts" sets forth that various sums of money representing unpaid dividends have been credited on the books of the Company to various accounts. We request that you furnish us with certified copies of the minutes of the Botany Worsted Mills covering the various declarations of dividends from January, 1916 to date and showing the amount of each dividend.

It is important that we secure the information embodied herein at an early date, and we would suggest that it would not only facilitate the handling of the cases, but would result in a much better understanding by all parties if the proper officers of your Company and the Botany Worsted Mills could arrange to visit Washington and confer with us on Monday or Tuesday of next week.

433 In further communications, please refer to the Division of Corporations, Trust No. 4017, Report No. 1869; also Trust No. 12118 et al. Report No. 5263.

Very truly yours,

(Signed)

RALPH STONE,
Director Bureau of Trusts.

A. B. D.: M. T. S.

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DEFENDANTS' EXHIBIT M.

(Page 1 of Confirmation of Transfer Book.)

Plagwitz-Leipzig, 13 Febr., 1890.

To the Treasurer of the Botany Worsted Mills, Passaic, N. J.

DEAR SIR:

I hereby certify that certificate No. 1801 representing shares Nos. 09001-09005 of the capital stock of the Botany Worsted Mills has been deposited with me, properly endorsed to Messrs. Gustave Ebell & Co. of Berlin with the request to cause the same to be transferred upon the books of the Company to the above-named endorsee, and that Mr. Oscar Dressler has been appointed by the owner of said

shares attorney to transfer the said shares on the books of the Company, with full power of substitution.

Yours truly,
(Sgd.)

E. STÖHR,
Vice-Treasurer.

(Stub:) Confirmation of Transfer. Date March 18th, '90.
Certif. No. 1801. Share No. 09001-09005. To Gustav Ebell & Co.,
Berlin.

435

DEFENDANTS' EXHIBIT N.

Defendants' Exhibit N consisted of four pages out of the Botany Worsted Mills record of transfers of shares. The stock of the Botany Worsted Mills was under the old by-laws, Defendants' Exhibit J, issued only in certificates of five shares each. Each five-share certificate had a corresponding page in the record of transfer book (Defendants' Exhibit N). Defendants' Exhibit N was made up as follows:

"Five Shares of \$100 Each,

Equal to

\$500

of the Capital Stock of the Botany Worsted Mills, Passaic, N. J.,

Incorporated under the Laws of the State of New Jersey.

Certificate No. —. Share- Nos. —. To — — —,

Owned by — — —,

Transfers.

Transferred to — — —, by deposit of certificate with — — —,
Passaic, N. J., — — —, 190—.

— — —,
Treas."

On each page of said record of transfer there were eleven other forms of certificate of transfer similar to the foregoing.

DEFENDANTS' EXHIBIT O.

(Page 236 of Confirmation of Transfer Book.)

236.

Plagwitz-Leipzig, January 15, 1915.

To the Treasurer of the Botany Worsted Mills,
Passaic, N. J.

DEAR SIR:

I hereby certify that certificate No. 51-1050, 3441-3500, 4061-5000 representing shares Nos. 251-5250, 17201-17500, 20301-25000 of the Capital Stock of the Botany Worsted Mills has been deposited with me, properly endorsed to Mr. Hans E. Stöchr as trustee of New York with the request to cause the same to be transferred upon the books of the Company to the above-named endorsee.

Yours truly,
(Sgd.)GEORG STÖHR,
Vice-President.

(Stub:) 236. Confirmation of Transfer. Date February 15, 1915. Certif. No. 51-1050, 3441-3500, 4061-5000. Share- No. 251-5250, 17201-17500, 20301-25000. To Mr. Hans E. Stöchr, as trustee. New York City.

DEFENDANTS' EXHIBIT P.

(Page 238 of Confirmation of Transfer Book.)

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Plagwitz-Leipzig, February 1st, 1915.

To the Treasurer of the Botany Worsted Mills,
Passaic, N. J.

DEAR SIR:

I hereby certify that certificate No. 1051-1400, 2004-2017, 2041-2060, 2151-2171, 2861-2884, 2890-2898, 3161-3260, 5251-5369, 5389-5411, 5451-5470 representing shares Nos. 5251-7000, 10016-10085, 10201-10300, 10751-10855, 14301-14420, 14446-14490, 15801-16300, 26251-26845, 26941-27055, 27251-28750 of the Capital Stock of the Botan- Worsted Mills has been deposited with me, properly endorsed to Mr. Max W. Stöchr as Trustee, of Passaic, N. J.,

with the request to cause the same to be transferred upon the books of the Company to the above-named endorsee.

Yours truly,

(Sgd.)

GEORG STÖHR,

Vice-President.

(Stub:) 238. Confirmation of Transfer. Date February 26, 1915. Certif. No. 1051-1400, 2004-2017, 2041-2060, 2151-2171, 2861-2884, 2890-2898, 3161-3260, 5251-5369, 5389-5411, 5451-5750. Share- No. 5251-7000, 10016-10085, 10201-10300, 10751-10855, 14301-14420, 14446-14490, 15001-16300, 26251-26845, 26941-27055, 27251-28750. To Mr. Max W. Stöhr as trustee, Passaic, N. J.

(Here follows Defendants' Exhibit Q. marked page 438.)

FOLD-OUTS ARE TOO LARGE TO BE FILMED

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DEFENDANTS' EXHIBIT R.

Dividends Paid to Stoehr & Sons, New York.

1,120 coupons No. 52 due April 15, 1916, credited in Account Current	\$78,400.00
1,120 coupons No. 53 due September 15, 1916, credited in Account Current under date of September 15, 1916..	\$16,800.00

Out of the above 1,120 coupons, 258 coupons were delivered in Passaic and 862 coupons were delivered in Germany, supposed to have been cancelled before a Notary Public.

Dividends Paid to Stoehr & Sons, Inc., New York.

258 coupons No. 54 delivered in Passaic and credited in Regular Account under date of April 15, 1917.....	\$18,060.00
258 coupons No. 55 due September 15, 1917, paid in cash against delivery of coupons.....	\$38,070.00
880 coupons No. 54 due April 15, 1917, credited in Special Account under date of April 15, 1917, Coupons still in Germany.....	\$61,600.00
880 coupons No. 55 due September 15, 1917, credited in Special Account under date of September 15, 1917, Coupons still in Germany.....	\$13,200.00

The value of said 880 coupons Nos. 54 and 55, aggregating \$74,800.00, was paid with accrued interest to Stoehr & Sons Inc. on November 22, 1918.

440

DEFENDANTS' EX. S.

Transfers of 5,690 Shares of Botany Worsted Mills Stock Standing in the Name of Stoehr & Sons, Inc.

4,180 shares were transferred from Eduard Stoehr to Stoehr & Sons, New York, by deposit of certificate with Treasurer as follows:

850 Shares—

Certificates No. 3761-3810— 250 shares.
 “ “ 6001-6120— 600 “

Total 850 shares on December 30, 1913; and

Certificates	No.				
		1-50	—	250	shares.
“	“	1431-1500	—	350	“
“	“	1516-1520	—	25	“
“	“	1626	—	5	“
“	“	1634-1637	—	20	“
“	“	1651-1659	—	45	“
“	“	1790-1800	—	55	“
“	“	1851-1890	—	200	“
“	“	2018-2023	—	30	“
“	“	2172-2180	—	45	“
“	“	3157-3160	—	20	“
“	“	3261-3340	—	400	“
“	“	3361-3370	—	50	“
“	“	3371-3380	—	50	“
“	“	3701-3760	—	300	“
“	“	3538-3560	—	115	“
“	“	3851-3860	—	50	“
“	“	3881-3919	—	195	“
“	“	5001-5142	—	710	“
“	“	5156-5162	—	35	“
“	“	5370-5376	—	35	“
“	“	5430-5450	—	105	“
“	“	5874	—	5	“
“	“	5922-5966	—	225	“
“	“	7178-7179	—	10	“

Total 3330 “ under date of Jan. 30, 1914.

Said 4,180 shares were transferred on February 20, 1917, to Stoehr & Sons Inc., as follows:

By deposit of Certificates with Georg Stoehr, Director . .	3,325	shares
By deposit of Certificate with Treasurer	250	shares
By deposit of Certificate with	605	shares

Total 4,180 shares

441 500 shares were transferred from Georg Stoehr on January 30, 1914, to Stoehr & Sons, New York, by deposit of Certificate with Treasurer.

Certificates	No.	1401-1430—	150	shares.
"	"	1731 —	5	"
"	"	1751-1760—	50	"
"	"	1831-1836—	30	"
"	"	3341-3349—	45	"
"	"	3421-3426—	30	"
"	"	3602-3603—	10	"
"	"	3606-3615—	50	"
"	"	3695-3700—	30	"
"	"	5193-5200—	40	"
"	"	5967-5968—	10	"
"	"	6619-6624—	30	"
"	"	6981-6984—	20	"

Total..... 500 shares.

All of said 500 shares were transferred on February 20, 1917, to Stoehr & Sons Inc. by deposit of Certificates with Georg Stoehr, Director.

810 shares were transferred from Hans E. Stoehr to Stoehr & Sons, New York, as follows:

800 shares—

Certificates	No.	3820 —	5	shares.
"	"	3946-3960—	75	"
"	"	6536-6575—	200	"
"	"	5984-5996—	65	"
"	"	1541-1545—	25	"
"	"	1550 —	5	"
"	"	1707-1725—	95	"
"	"	1934-1940—	35	"
"	"	3041-3050—	50	"
"	"	3531-3537—	35	"
"	"	4048-4050—	15	"
"	"	6514 —	5	"
"	"	6576-6607—	160	"
"	"	7108-7109—	10	"
"	"	7182-7185—	20	"

Total..... 800 shares—By deposit of Certificate with Treasurer on January 30, 1914.

Certificate No. 7180-7181—10 shares were transferred on March 18, 1914, by deposit of Certificate with Treasurer.

Out of the said 810 shares, 340 shares were transferred on February 20, 1917, to Stoehr & Sons Inc. by deposit of Certificate with Treasurer; 465 shares were transferred on February 20, 1917, to

Stoehr & Sons Inc. by deposit of certificate with Georg Stoehr, Director; 5 shares No. 3820 were transferred on February 27, 1917, to Herbert A. Heyn by deposit of certificate with Treasurer.

442 95 shares were transferred from Max W. Stoehr to Stoehr & Sons, New York, on January 30, 1914, by deposit of certificate with Treasurer—

Certificate No.	6139-6148—	50	shares.
"	" 6526-6534—	45	"
"	" 6526-6534—	45	"
Total.....		95	shares.

Said shares were transferred on February 20, 1917, to Stoehr & Sons, Inc. by deposit of certificates with Treasurer.

15 shares were transferred from Allgemeine Deutsche Credit Anstalt to Stoehr & Sons, New York, on April 17, 1914, by deposit of certificates with Georg Stoehr, Director, No. 6992-6994. Said shares were transferred on February 20, 1917, to Stoehr & Sons Inc. by deposit of Certificates with Georg Stoehr, Director.

90 shares—

Certificates No.	1521-1530—	50	shares.
"	" 1572-1573—	10	"
"	" 3091-3092—	10	"
"	" 5872 —	5	"
"	" 7167-7169—	15	"

Total..... 50 shares were transferred from Stadtgemeinde Augsburg on January 24, 1916, to Stoehr & Sons by deposit of certificate with Georg Stoehr, Director. Said shares were transferred on February 20, 1917, to Stoehr & Sons Inc. by deposit of certificates with Georg Stoehr, Director.

DEFENDANTS' EXHIBIT T.

Dividends Paid on 14,900 Shares From February 20, 1917, to January 24, 1920.

Date declared payable.	Rate.	Amount.	To whom paid.	Date paid.
April 15, 1917....	14%	\$208,600.00	Credited to acct. Stoehr & Sons, Inc., Special, under date of Mar. 31, 1917.	
			Paid to A. Mitchell Palmer, A. P. C.....	April 25, 1918
Sept. 15, 1917....	3%	44,700.00	Credited to acct. Stoehr & Sons, Inc., Special, under date of Oct. 31, 1917.	
			Paid to A. Mitchell Palmer, A. P. C.....	April 25, 1918
June 28, 1918....	22%	327,800.00		
			Paid to People's Bank & Trust Co., Passaic, as depository for Alien Property Custodian	June 28, 1918
Sept. 15, 1918....	3%	44,700.00		
			Paid to People's Bank & Trust Co., Passaic, as depository for Alien Property Custodian	Sept. 16, 1918

April 15, 1919....	3%	44,700.00	Paid to People's Bank & Trust Co., Passaic, as de- positary for Alien Prop- erty Custodian	Sept. 23, 1919
Sept. 15, 1919....	3%	44,700.00	Paid to People's Bank & Trust Co., Passaic, as de- positary for Alien Prop- erty Custodian	Sept. 23, 1919
Oct. 1, 1919....	19%	283,100.00	Paid to People's Bank & Trust Co., Passaic, as de- positary for Alien Prop- erty Custodian	Oct. 6, 1919
Total		<u>\$998,300.00</u>		

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DEFENDANTS' EXHIBIT U.

Book Value of Capital Stock of Botany Worsted Mills, Passaic, N. J.

Date.	Book value per share.	Book value 14,900 shares.		
Feb. 20/19...	348,963.79	5,199,559.58	One fifth of \$4,737,937.46 equals.....	\$947,587.49
as of Nov. 30/17.			Add Dividends for said 14,900 shares from Feb. 20, 1917 to Feb. 20, 1918, 17%.....	253,300.00
			Total Feb. 20, 1918.....	<u>\$1,200,887.49</u>
Feb. 20/19...	348,963.73	5,199,559.58	One fifth of \$5,199,559.58 equals.....	1,039,911.91
			Add four-fifths of dividends of \$372,500 (25%) paid on said 14,900 shares from Feb. 20/18 to Feb. 20/19	<u>298,000.00</u>
			Total Feb. 20, 1919.....	<u>\$1,337,911.91</u>

Referring to Sub-Division C of Paragraph 2 of agreement between Kammarnspinnerei Stoehr & Co. and Stoehr & Sons, Inc., dated Feb. 20, 1917 it states that "in arriving at the amount of each installment for each of said years the net worth of the hard assets of the Botany Worsted Mills after deducting the total liabilities shall be taken as the basis for the computation of the value per share and no allowance or increase shall be made on such installment for good will."

Neither Mr. Karl Zimmermann, the accountant of the Company, nor I myself know what said provision means as we do not know the meaning of the words "the net worth of the hard assets of the Botany Worsted Mills;" neither one of us ever heard that expression used and the phrase "hard assets" was never used in the bookkeeping of the Botany Worsted Mills.

In computing the book value of said 14,900 shares, we have taken the sum of the capital stock, amount \$3,600,000.00 to which was added the paid in surplus, amount \$1,050,000.00, and the surplus from operations for each year and divided such aggregate sum by 36,000, the total number of shares outstanding.

Said book value as of November 30, 1917 and November 30, 1918 may possibly be changed somewhat as the result of certain tax matters now pending in Washington, although the figures shown are in accordance with the books of the Company.

Directors.

March 17th, 1914.

Mr. Eduard Stoehr.
 " Antonio Knauth.
 " Hans E. Stoehr.
 " Ferdinand Kuhn.
 " Thomas Prehn.
 " George Roehlig.
 " George Stoehr.
 " C. H. Wolfrum.

March 16th, 1915.

Mr. Eduard Stoehr.
 " Antonio Knauth.
 " Hans E. Stoehr.
 " Ferdinand Kuhn.
 " Thomas Prehn.
 " Georg Roehlig.
 " Georg Stoehr.
 " C. H. Wolfrum.
 " Alfred de Liagre.
 " Otto Kuhn.
 " Max W. Stoehr.

December 21st, 1915.

Mr. Camill Mehl.

March 21st, 1916.

Mr. Eduard Stoehr.
 " Thomas Prehn.
 " Hans E. Stoehr.
 " Ferdinand Kuhn.
 " Georg Roehlig.
 " Georg Stoehr.
 " Alfred de Liagre.
 " Otto Kuhn.
 " Camill Mehl.
 " Max W. Stoehr.

Officers.

March 17th, 1914.

Mr. Eduard Stoehr, Pres.
 " Antonio Knauth, 1st Vice-Pres.
 " George Stoehr, 2nd Vice-Pres.
 " Ferdinand Kuhn, Treas.
 " Hans E. Stoehr, Vice-Treas.
 " George Roehlig, Supt.
 " Thomas Prehn, Sec.

March 16th, 1915.

Mr. Thomas Prehn, Pres.
 " Antonio Knauth, 1st Vice-Pres., died Dec. 3rd, 1915.
 " Ferdinand Kuhn, 2nd Vice-Pres.
 " Hans E. Stoehr, Treas.
 " Georg Roehlig, Vice-Treas. & Supt.
 " Max W. Stoehr, Sec.

March 21st, 1916.

Mr. Thomas Prehn, Pres.
 " Ferdinand Kuhn, Vice-Pres.
 " Hans E. Stoehr, Treas.
 " Georg Roehlig, Vice-Treas. & Supt.
 " Max W. Stoehr, Sec.

Directors.

March 20th, 1917.

Mr. Hans E. Stoehr.
 " Max W. Stoehr.
 " Thomas Prehn.
 " Georg Rochlig.
 " Ferdinand Kuhn.
 " Otto Kuhn.
 " Camill Mehl.
 " Alfred de Liagre.
 " Eduard Stoehr.
 " Georg Stoehr.

March 26th, 1918.

Mr. James N. Wallace.
 " Thomas J. Maloney.
 " Francis P. Garvan, resigned
 July 1st, 1918.
 " Andrew B. Duvall.
 " George T. Smith, did not act
 as Director.
 " H. C. McEldowney.
 " Horace C. Jones.

446 April 2nd, 1918.

Mr. Thomas Prehn.
 " Ferdinand Kuhn.
 " Max W. Stoehr, resigned
 Oct. 10th, 1918.
 " Georg Rochlig, died Oct.
 29th, 1918.

April 15th, 1918.

Mr. Thomas F. Martin.

August 20th, 1918.

Mr. Richard Stockton.

November 1st, 1918.

Mr. Herbert P. Howell.
 Mr. Wm. J. Hellmer.

Officers.

March 20th, 1917.

Mr. Thomas Prehn, Pres.
 " Ferdinand Kuhn, Vice-Pres.
 " Hans E. Stoehr, Treas.
 " Georg Rochlig, Vice-Treas. &
 Supt.
 " Max W. Stoehr, Sec.
 Eduard Stoehr and Georg
 Stoehr dropped from Board July
 1st, 1917.

April 2nd, 1918.

Mr. Thomas Prehn, Pres.; re-
 signed as Pres. August
 20th, 1918.
 Mr. Ferdinand Kuhn, Vice-Pres.
 Mr. Thomas J. Maloney, Treas.
 " Georg Rochlig, Vice-Treas. &
 Supt., died Oct. 29th, 1918.
 " Max W. Stoehr, Sec., resigned
 Oct. 10th, 1918.
 " Wm. J. Hellmer, Asst. Treas.

November 1st, 1918.

Mr. Wm. J. Hellmer, Sec.

*Directors.**Officers.*

March 7th, 1919.

Mr. James N. Wallace, Pres., re-
signed March 18th, 1919.

March 18th, 1919.

Mr. Andrew B. Duvall.
" Wm. H. Folwell.
" Wm. J. Hellmer.
" Herbert P. Howell.
" Horace C. Jones.
" Ferdinand Kuhn.
" Thomas J. Maloney.
" Thomas F. Martin.
" Thomas Prehn.
" Richard Stockton.
" James N. Wallace, resigned
March 18th, 1919.

March 27th, 1919.

March 27th, 1919.

Mr. Douglas I. McKay.

Mr. Ferdinand Kuhn, Pres.
" Horace C. Jones, Vice-Pres.
" Thomas J. Maloney, Treas.
" Wm. J. Hellmer, Sec. & Asst.
Treas.
" Carl Schlachter, Supt.

447

DEFENDANTS' EXHIBIT X.

Botany Worsted Mills,
Passaic, New Jersey,
February 3, 1918.

DEAR MR. HEYN:

I wish to thank you for the satisfactory message, which you gave me over the telephone, reporting about your interview at the Department of the Alien Property Custodian. I am sorry that the permit for my coming to Washington was not granted. It might have helped to straighten out any questions. At the same time the evidence and information, which you have, may be sufficient to enable you to bring this matter to a satisfactory conclusion.

Herewith I am enclosing another letter, containing the information asked for in regard to the holdings of stock in the Botany Worsted Mills, and Stoeck & Sons Inc. In addition I give you a list of the stockholders of the Botany Worsted Mills as follows:

Stoehr & Co.....	14,900	shares	
Hirsch & Arnold.....	4,100	"	
(s) Various German Stockholders..	6,400	"	
			25,400 shares
Stoehr & Sons.....	5,685	"	
Claimed by Prehn and others..	1,205	"	
Various Stockholders in U. S. A.	3,710	"	
			10,600 "
Total			36,000 "

448 I also enclose list of papers mailed to you under separate cover, by registered mail, special delivery.

I shall be at the New York Office all day tomorrow, Wednesday, Feb. 6th, in case you wish additional information.

With kindest regards to both Mr. Lenssen and yourself, I am

Sincerely yours,
(Sgd.)

HANS E. STOEHR.

2 Enclosures.

Herbert A. Heyn, Esq.,
Hotel Raleigh,
Washington, D. C.

Special delivery.

449 DEFENDANTS' EXHIBIT Y.

Botany Worsted Mills, Passaic, N. Y.

*Statement of the Number of Votes Cast at Stockholders' Meetings
as Shown by the Minutes from March 15, 1910, to May 28, 1919.*

Annual Meeting March 15, 1910

(at Which Directors Were Elected).

Total number of votes cast.....	25,725	(proxies at Mill)
Kaifungarnspinnerei Stoehr & Co.		
voted in person.....	14,945	
Eduard Stoehr voted in person.....	4,185	

(x) Including about 1,000 shares of Australian stockholders.

Annual Meeting March 21, 1911

(at Which Directors Were Elected).

Total number of votes cast.....	23,675	(proxies at Mill)
Antonio Knauth voted as proxy for Kammgarnspinnerei Stöhr & Co.	14,910	
Hans E. Stöhr voted as proxy for Commerzienrat E. Stöhr.....	4,335	
Hans E. Stöhr voted in person..	720	

Annual Meeting March 19th, 1912

(at Which Directors Were Elected).

Total number of votes cast.....	29,025	(proxies at Mill)
Kammgarnspinnerei Stöhr & Co., A. G. represented by Georg Stöhr in person.....	14,910	
Hans E. Stöhr voted as proxy for Eduard Stöhr	4,185	
Hans E. Stöhr voted in person....	785	
Georg Stöhr voted in person.....	555	

Annual Meeting March 18, 1913

(at Which Directors Were Elected).

Total number of votes cast.....	27,240	(proxies at Mill)
Hans E. Stöhr voted as proxy for Kammgarnspinnerei Stöhr & Co., A. G.	14,910	
Hans E. Stöhr voted as proxy for Eduard Stöhr	4,185	
Hans E. Stöhr voted as proxy for Georg Stöhr	555	
Hans E. Stöhr voted in person....	785	
Max W. Stöhr voted in person....	100	

Annual Meeting March 17, 1914

(at Which Directors Were Elected).

Total number of votes cast.....	24,300	(proxies at Mill)
Stöhr & Sons voted in person.....	5,575	
Hans E. Stöhr voted as proxy for Kammgarnspinnerei Stöhr & Co., A. G.	14,910	

Annual Meeting March 16, 1915

(at Which Directors Were Elected).

Total number of votes cast.....	24,535	(proxies not found)
Stoehr & Sons voted in person.....	5,600	
A. G. represented by Georg Stoehr voted in person.....	5,000	
Kammgarnspinnerei Stoehr & Co. Hans E. Stoehr as Trustee voted in person	10,000	

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Annual Meeting March 21, 1916

(at Which Directors Were Elected).

Total number of votes cast.....	24,505	(proxies not found)
Stoehr & Sons voted in person	5,600	
Max W. Stoehr Trustee voted in person	4,900	
Hans E. Stoehr Trustee voted in person	10,000	

Annual Meeting March 20th, 1917

(at Which Directors Were Elected).

Total number of votes cast.....	28,865	(proxies not found)
Stoehr & Sons Inc. voted in person	20,585	

Annual Meeting March 19th, 1918

(at Which No Directors Were Elected)

Total number of shares represented	29,315	(proxies at Counsel's office)
Max W. Stoehr as proxy for Stoehr & Sons Inc.....	20,585	

Adjourned Annual Meeting March 26th, 1918 (at Which 7 Directors
Nominated by the Alien Property Custodian Were Elected).

Total number of votes cast.....	24,975	(proxies at Counsel's office)
Max W. Stoehr voted as proxy for Stoehr & Sons Inc.....	20,550	

Adjourned Annual Meeting April 2, 1918

(at Which 4 Directors Were Elected).

Total number of votes cast..... 24,975 (proxies at
Counsel's office)

Max W. Stoehr voted as proxy for
Stoehr & Sons Inc..... 20,550

Adjourned Meeting of Stockholders June 13, 1918 (for Approval
of Balance Sheet as of Nov. 30, 1917).

Total number of votes cast..... 35,740 (proxies at
Counsel's office)

Andrew B. Duvall voted as proxy for
A. Mitchell Palmer and People's
Bank & Trust Co. as depositary for
A. Mitchell Palmer..... 25,605

Max W. Stoehr voted as proxy for
Stoehr & Sons Inc..... 5,650

Special Meeting of Stockholders July 30, 1918 (to Approve By-laws).

Total number of votes cast..... 28,325 (proxies at
Counsel's office)

A. B. Duvall voted as proxy for A.
Mitchell Palmer, Alien Property
Custodian 25,605

Annual Meeting of Stockholders March 18th, 1919 (at Which 11
Directors Were Elected).

Total number of shares represented.. 29,315

Total number of votes cast..... 28,665 (proxies at
Counsel's office)

John Quinn and Andrew B. Duvall
voted as proxy for Francis P.
Garvan 25,615

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DEFENDANTS' EX. "Z."

Declaration of Trust.

Know all men by these presents that I, the undersigned, do hereby declare and certify that I hold the Two Hundred and twenty-three and twenty-one hundredths (223 & 21/100) shares of stock of Stoehr & Sons, Inc., a New York corporation, which are standing in my name and are evidenced by certificate No. 3 of said Company, dated February 19, 1917, in trust for the benefit of Georg Stoehr, who is the beneficial owner of the same and that said shares of stock are

standing in my name as a matter of convenience and that I myself have no interest in the same except as trustee.

I do further agree that I will at any time at the request of said Georg Stoehr endorse and transfer the said shares to him or his nominees.

In witness whereof I have hereunto set my hand and seal this 19th day of February, 1917.

MAX W. STÖHR. [L. S.]

In the presence of:

HERBERT A. HEYN.

452 Know all men by these presents, That I Max W. Stöhr for value received, have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer unto Eduard Stöhr Certificate No. 1 for eighteen hundred & seventy-five (1,875) shares of stock of Stoehr & Sons, Inc., standing in my name, on the books of the Stoehr & Sons, Inc., and do hereby constitute and appoint Eduard Stöhr my true and lawful Attorney irrevocable for and in my name and stead to my use, to sell, assign, transfer and set over all or any part of the said Stock, and for that purpose to make and execute all necessary acts of Assignment and Transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that said Attorney or substitute or substitutes shall lawfully do by virtue hereof.

In witness whereof, I have hereunto set my hand and seal the 19th day of February one thousand nine hundred and seventeen.

MAX W. STÖHR.

Sealed and delivered in the presence of
GEORG G. ROHLIG.

453 *Declaration of Trust.*

Know all men by these presents that I, the undersigned, do hereby declare and certify that I hold the Eighteen hundred and seventy-five (1,875) shares of stock of Stoehr & Sons, Inc., a New York corporation, which are standing in my name and are evidenced by certificate No. 1 of said Company dated February 19, 1917, in trust, for the benefit of Eduard Stoehr, who is the beneficial owner of the same and that said shares of stock are standing in my name as a matter of convenience and that I myself have no interest in the same except as trustee.

I do further agree that I will at any time at the request of said Eduard Stoehr endorse and transfer the said shares to him or his nominees.

In witness whereof I have hereunto set my hand and seal this 19th day of February, 1917.

MAX W. STÖHR. [L. S.]

In the Presence of:

GEORG G. RÖHLIG.

DEFENDANTS' EXHIBIT A-1.

Defendants' Exhibit A-1 consisted of the by-laws of the Botany Worsted Mills adopted July 30, 1918. Articles 1, 2 and 3 thereof were the same as corresponding articles in Defendants' Exhibit J. Article 4 was amended to strike out the provision of the old by-laws, Defendants' Exhibit J, requiring that stock should be issued in certificates of five shares each.

Article 5 relates to officers. Article 6 relates to the duties of the President and Vice-President. Article 7 relates to the duties of the Treasurer and Assistant Treasurer. Article 8, duties of Superintendent. Article 9, duties of Secretary. Article 10, directors and their compensation and the Executive Committee. Article 11, the business year. Article 12, meetings of directors. Article 13, meetings of stockholders. Article 14, place of meetings. Article 15, quorum. Article 16, alteration and amendment of by-laws. Article 17, relating to the stockholders and elections, was as follows:

"Article XVII.

Stockholders and Elections.

"1. Each stockholder shall be entitled to a certificate or certificates stating the number of shares held by him. Each stockholder of the company shall be entitled at any meeting of stockholders to one vote for each share of stock registered in his name on the books of the company which is represented at said meeting by him in person or by proxy. The registered holder of each share of stock shall be deemed by the company to be the owner thereof, and the company shall be under no obligation or duty to recognize any other ownership thereof or interest therein.

"2. At all stockholders' meetings stockholders may vote in person or by a proxy authorized by a writing executed by the record holder of the shares on the books of the company. No proxy shall be voted on, allowed or received at any meeting held more than eleven months after its date.

No share of stock shall be voted on at an election for directors which has been transferred on the books of the company within ten days preceding such election."

Article 18 relating to transfer of shares was as follows:

"Article XVIII.

Transfer of Shares.

"Stock shall be transferable only upon the books of the company by the holder thereof in person or by his duly authorized attorney. The holder of record of stock upon the books of the company shall

be the only person whom the company shall recognize as the owner thereof.

"The stock transfer books may be closed for such period and under such conditions as the board of directors may at any time determine.

"The board of directors may, in its discretion, designate and appoint a trust company to be the transfer agent of the stock of the company."

Article 19 relates to lost, stolen or destroyed certificates of stock. Article 20, to dividends and net profits. Article 21 relating to the distribution of profits was as follows:

Article XXI.

Distribution of Profits.

"1. After the close of the first half of every business year of the company, a computation of profits shall be made and, if practicable, a dividend not exceeding three per cent (3%) shall be declared, payable on the September fifteenth following.

455 "2. At the close of the business year the net profits of said business shall, after deductions in the absolute discretion of the board of directors shall have been made for or on account of depreciation in the value of the plant or property of the company, and after the board of directors shall, also in its absolute discretion, have made or provided special deductions from accounts, and provided for or set aside reserves of all kinds, or additional reserves, in the discretion of the board of directors be distributed as follows:

(1) To the stockholders a dividend of six per cent (6%), in the computation of which said dividend payable September fifteenth the same business year shall be included.

(2) To employees as extra compensation such sums, if any, as the board of directors in its absolute discretion may determine.

(3) The net profits of said business year remaining after the payment of or provision for (1) and (2) above shall be applied as follows:

(a) Five per cent. (5%) thereof shall be placed in a reserve fund until the amount of the reserve fund accumulated shall be equal to twenty per cent (20%) of the paid up capital stock of the Company for the time being.

(b) Such sum not exceeding thirty-two per cent (32%) thereof, as the board of directors with the approval of the stockholders given at the annual meeting of the stockholders of the Company or at a special meeting called for that purpose shall determine, shall be paid to the members of the board of directors or officers and executives, or any of them, as additional compensation for their services. Each such director, officer and executive shall receive of said sum such pro-

portion as shall be determined by the board of directors with the approval of the stockholders as aforesaid. Said proportion may as to any one or more of said directors or officers and executives be so determined after the close of said business year, or, in the discretion of the board of directors, with the approval of the stockholders given at the annual meeting of the stockholders of the Company or at a special meeting called for that purpose, at any time prior to the close of said business year by contract between the Company and such director or officer or executive.

But nothing in this article contained shall be held or deemed to impair or effect the force or validity of the contracts heretofore made between the Company and certain officers and executives for the fiscal year ended November 30, 1918.

(c) The residue may be applied as follows:

(I) For payments to or provisions for any institutions, such as pension funds and other similar institutions, which are designed to benefit employees.

(II) For such additional dividend or dividends as the board of directors shall in its sole discretion determine.

The action of the board in respect to any deductions or reserves, or the action of the board and the stockholders in respect to any such distribution of extra compensation, if any, and the proportions thereof, if any shall be distributed, and the making of any other decision or the exercising of any other discretion, and action or non-action upon or in respect of any other matter embraced in or contemplated by this article, shall be conclusive and final and shall not be subject to review or attack by any director, officer or executive or other person in any court or forum.

Article 22, seal. Article 23, Executive Committee.

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DEFENDANTS' EX. B-1.

Waiver of Notice and Minutes of Meeting of the Board of Directors of Stoechr & Sons, Inc., Held June 1st, 1917.

457

Stoechr & Sons, Inc.

Waiver of Notice of Meeting of the Board of Directors of Stoechr & Sons, Inc.

We, the undersigned, being all the directors of the above named Company, do hereby waive notice of the time, place and object of holding a meeting of the Board of Directors of said Company, and do hereby appoint the office of the Botany Worsted Mills, Passaic, New Jersey, as the place and June 1st, 1917, at 11 o'clock A. M. as the time of holding the said meeting, and do hereby consent to and

ratify any and all action of the Board of Directors taken at said meeting.

Dated: New York, June 1st, 1917.

HANS E. STOEHR.
MAX W. STÖHR.
GEORG G. RÖHLIG.
ALFRED DE LIAGRE.

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Stoehr & Sons, Inc.

Minutes of Meeting of the Board of Directors of Stoehr & Sons, Inc.

A meeting of the Board of Directors of the above named Company was held on the 1st day of June, 1917, at 11 o'clock A. M. at the office of the Botany Worsted Mills, at Passaic, New Jersey, pursuant to a written waiver of notice signed by all of the directors fixing said time and place.

The following directors were present:

Messrs. Hans E. Stoehr, Max W. Stöhr, Georg G. Röhlig, Alfred de Liagre, constituting the entire board of directors.

Mr. Hans E. Stoehr, president, presided and Mr. Max W. Stöhr acted as secretary of the meeting.

The secretary presented and read a waiver of notice of the meeting signed by all the directors which was ordered filed in this minute book.

The reading of the minutes of the last meeting of the board of directors of the Company was dispensed with.

Upon motion duly made, seconded and carried, the following resolutions were adopted:

Resolved, that the company issue debenture bonds to the total amount of \$1,000,000 divided into 1,000 bonds of \$1,000 each, which bonds shall be payable in gold coin of the United States, principal as well as interest, and shall bear date March 1st, 1917, and shall be payable in ten years from the date thereof, and shall be redeemable at the option of the company after five years from the date thereof, and if redeemed before maturity, such redemption shall be at

the rate of 105, in other words, \$1,050 for each of said bonds;

458½ said bonds shall bear interest as aforesaid at the rate of 6% payable March 1st and September 1st, in the City of

New York; coupons for the payment of interest shall be annexed upon which the signature of the treasurer may be printed; the bonds shall be payable to bearer (or may be registered at the option of the bondholder, and in such event, shall be payable to the registered owner) and shall be signed by the president or vice president and the treasurer of the Company.

Resolved further, that the president and treasurer are authorized to have a proper form of bonds and coupons prepared and to cause the same to be printed and to be executed by the officers of the company as hereinbefore directed, and to seal the same with the seal of the company; said bonds to be numbered 1 to 1,000 both inclusive, and the said officers of the company are authorized to issue the said

1,000 bonds at par and apply the same to any lawful purposes of the company including the raising of capital and the payment of any debts, accounts or obligations of the company.

Resolved further, that the officers of the Company hereinbefore named are authorized and directed to prepare or to have prepared, signed, executed and delivered any and all papers and to perform all acts necessary or proper to carry out the foregoing resolutions.

There being no further business before the meeting the same thereupon adjourned.

MAX W. STÖHR,

Secretary.

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DEFENDANTS' EXHIBIT C-1.

- (9) *Demand by Alien Property Custodian for Rights, Privileges and Benefits of Kammgarnspinnerei Stoehr & Company under the Contract Between It and Stoehr & Sons, Inc., Dated February 20, 1917.*

Mr. Quinn reported that the Treasurer of this Company had been served by the Alien Property Custodian with a demand for the rights, privileges and benefits of Kammgarnspinnerei Stoehr & Company, Actiengesellschaft, under the contract between it and the Company dated February 20, 1917, with respect to 14,900 shares of Botany Worsted Mills stock, and that the Treasurer of the Company had admitted service of said demand.

Upon motion, duly seconded and unanimously carried, it was

Resolved that the action of the Treasurer of this Company in admitting service of said demand be and the same hereby is approved; and that Mr. Quinn, as counsel for this Company, be and he hereby is authorized and directed to write to the Alien Property Custodian in response to said demand stating that (1) Stoehr & Sons, Inc. has made no payments to said Kammgarnspinnerei Stoehr & Company, Actiengesellschaft, under said contract dated February 20, 1917; (2) that Stoehr & Sons, Inc. will make no payments to the said Kammgarnspinnerei Stoehr & Company under said contract while the Trading with the Enemy Act is in force; and (3) that this Company has been advised that said contract of February 20, 1917, was abrogated and became inoperative upon the declaration of war; that this Company has in its possession nothing to deliver to the Alien Property Custodian pursuant to said demand, but that it accepts said demand and gives it full force and effect and does not wish in any way to question its propriety or legal effect.

- (10) *Demands Served upon the Company by the Alien Property Custodian on March 13, 1919.*

Counsel reported that the Alien Property Custodian on March 13, 1919, had served demands upon the Company as follows:

(a) For stock of Eduard Stoehr and Georg Stoehr in Stoehr & Sons, Inc.

(b) For voting trust certificates of the same enemies representing or purporting to represent stock in Stoehr & Sons, Inc.

(c) The interests of said enemies in the partnership of Stoehr & Sons.

Upon motion, duly seconded and unanimously carried, it was Resolved that counsel for this Company be and he
461 hereby is authorized and directed to write to the Alien Property Custodian in response to said demands stating that:

(1) With reference to the demand for the stock of Eduard Stoehr and Georg Stoehr, the said stock was issued on February 19, 1917, as follows:

No. of certificate,	To whom issued.	Number of shares.
1	Max W. Stoehr	1,875
3	Max W. Stoehr	223.21;

that the said Max W. Stoehr received said certificate No. 1 as trustee for Eduard Stoehr and certificate No. 3 as trustee for Georg Stoehr; that on the same day, namely, February 19, 1917, all of the shares of the stock of Stoehr & Sons, Inc., amounting to 2,500 shares, were transferred to Hans E. Stoehr, Max W. Stoehr and Georg Roehlig as voting trustees, and certificate No. 5 for 2,500 shares was issued to said three voting trustees and now stand in their name; that the said Hans E. Stoehr and the said Georg Roehlig have since died and the said Max W. Stoehr is now the sole surviving voting trustee; that none of said voting trustees were alien enemies; that therefore Stoehr & Sons, Inc. cannot comply with the demand for the said stock, but that the Board of Directors accepts the said demand for the purpose of giving the same full force and effect and does not in any way wish to question its propriety or legal effect.

462 (2) With reference to the demand for the voting trust certificates of Eduard and Georg Stoehr, said voting trust certificates are in the name of Max W. Stoehr and are in the possession of the Passaic Trust and Safe Deposit Company of Passaic, New Jersey, as depository for the Alien Property Custodian; that said voting trust certificates are as follows:

No. of certificate.	To whom issued.	Number of shares.
1	Max W. Stoehr, trustee.	1,875
3	Max W. Stoehr, trustee.	223.21;

that Stoehr & Sons, Inc., and the Board of Directors of this Company have no power to compel Max W. Stoehr to make and issue new voting trust certificates and deliver the same to the Alien Property Custodian, but that this Company accepts said demand for what it may be worth and does not wish to question the propriety or legal effect of said demand.

(3) With reference to the demand for the interests of Eduard Stoehr and Georg Stoehr in the partnership of Stoehr & Sons, Stoehr

& Sons, Inc. cannot comply with the demand of the Alien Property Custodian for the delivery to him of 42/56 of the assets of the partnership, Stoehr & Sons, being the proportionate interest of Eduard Stoehr, and 5/56 of said partnership assets, being the proportionate interest of Georg Stoehr, for the reason that the assets of said partnership were by bill of sale dated February 19, 1917, transferred
 463 to Stoehr & Sons, Inc.; that the consideration for the transfer of said assets was the issuance of all of the stock of Stoehr & Sons, Inc.; that the stock of Stoehr & Sons, Inc. was thereupon issued as follows:

No. of certificate.	To whom issued.	Number of shares.
1	Max W. Stoehr.	1,875
2	Hans E. Stoehr.	359-14/100
3	Max W. Stoehr.	223-21/100
4	Max W. Stoehr.	44-65/100;

that thereafter all of said shares of stock of Stoehr & Sons, Inc. were transferred to Hans E. Stoehr, Max W. Stoehr and Georg Roehlig as voting trustees and voting trust certificates were then issued therefor as follows:

No. of certificate.	To whom issued.	Number of shares.
1	Max W. Stoehr, trustee.	1,875
2	H. E. Stoehr.	357-14/100
3	Max W. Stoehr, trustee.	223-21/100
4	Max W. Stoehr, trustee.	44-65/100;

that so long as said voting trust certificates are outstanding and said stock outstanding, and until the same are surrendered and returned to this company for cancellation, this Board is advised by counsel that it would have no right or power to deliver the proportion of the assets of Stoehr & Sons belonging to said partners, and received by this company under said bill of sale, or the avails of said assets, to the Alien Property Custodian; but that this Company accepts
 464 said demand for what it may be worth and does not wish to question its propriety or legal effect.

465

DEFENDANTS' EXHIBIT "D1."

Trust No. 4017. (Duplicate Original.) Report No. 5263.

Demand by Alien Property Custodian.

(Copy to Stoehr & Sons, Inc., 200 Fifth Ave., (120 Broadway), New York City.)

To Botany Worsted Mills,
 Address, Dayton Ave., Passaic, N. J.:

I, A. Mitchell Palmer, Alien Property Custodian, duly appointed, qualified and acting under the provisions of the Act of Congress

known as the "Trading with the Enemy Act," approved October 6, 1917, and the amendments thereto, and the proclamations and executive orders issued in pursuance thereof, by virtue of the authority vested in me by said Act, said proclamations and executive orders, after investigation do determine that those certain shares of your capital stock heretofore registered and standing upon your books in the name of the person or persons listed in Column No. 1 of the schedule marked "Exhibit A" attached hereto and made a part hereof, (said schedule being identified by the signature Dorothy Pilcher on the margin thereof) and evidenced or represented by a certificate or certificates numbered as specified in Column No. 2 of said schedule on the same line with the name of the person in whose name said stock is registered or stands, of the number and class of shares listed in Column No. 3 of said schedule, on the same line as aforesaid, belong to and are by you held for, on account of, on behalf of, or for the benefit of the person or persons listed on the same line therewith in Column No. 4 of said schedule.

I do further, after investigation, determine that said persons whose names are listed in said Column No. 4 and whose addresses are given in Column No. 5 on the same line therewith, are enemies and each of them is an enemy not holding a license granted by the President (Interlineation made before execution) within the purview of said Act as amended and said proclamations and executive orders issued in pursuance thereof.

As such Alien Property Custodian, by virtue of the authority vested in me, I do hereby seize such shares of stock and each and all of them, and do require that the same be by you transferred, assigned and delivered to me; and you are required to cancel forthwith upon your books and records all of the said shares of stock listed in said schedule and in lieu thereof to issue new certificates respectively in the name of the person or persons as specified in Column No. 6 of said schedule.

This demand is supplementary to any demands which may have been heretofore made upon you with respect to said shares or certificates and shall not prejudice or affect any such demands or any rights acquired by virtue thereof.

Witness my hand and seal of office, this 11th day of February, 1919.

[Seal of A. P. C. Office.]

(Signed)

A. MITCHELL PALMER,

Alien Property Custodian.

(Signed) T. L. PLACE.

On the back of the foregoing exhibit is the following admission of service:

"Service of the within demand accepted this 24th day of February, 1919.

BOTANY WORSTED MILLS,

(Signed)

By W. J. HELLMER,

Secretary and Assistant Treasurer."

466 Annexed to the foregoing demand as Exhibit A and made part thereof was a schedule therein identified, in Column No. 1 of which under the printed heading reading as follows: "Name of person in whose name shares of stock or other beneficial interests stand or stood," were the words: "Stoehr & Sons, Inc." In the second Column, with the printed heading "Certificate No. —," were the numbers of the five-share certificates aggregating 14,900 shares. In the third column, headed "Number and kind of shares," under the column headed "common" appeared "14,900." The fourth column had the following printed heading: "Name of enemy for, on account of, or on behalf of whom shares of stock or other beneficial interests are or were held." And under that column appeared the following: "Kammgarnspinnerei Stoehr & Co., Aktiengesellschaft." In the fifth column, under the printed heading "Address" appeared: "Plagwitz-Leipzig, Germany." The sixth column, had the printed heading: "Name to whom new certificate to be issued," and below said heading was the following:

"A Mitchell Palmer as Alien Property Custodian—Trust No. 4,017.

"The above new certificates to be delivered to Peoples Bank & Trust Company of Passaic, N. J., as depository for Alien Property Custodian."

467

DEFENDANTS' EXHIBIT E1.

Original.

J. M. C. C./E. C.
A. P. C. Form No. 106-A.

Report No. 4845.
Trust No. E-1293.

Demand on Corporation for Stockholder's Interest Without Presentation of Certificates.

Alien Property Custodian.

Demand by Alien Property Custodian for Property.

Extracts from "Trading with the Enemy Act."

Sec. 7 (c). "If the President shall so require, any money or other property owing or belonging to or held for, by on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian."

Sec. 7 (e). "No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act."

"Any payment, conveyance, transfer, assignment or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. The alien property custodian and such other persons as the President may appoint shall have power to execute, acknowledge, and deliver any such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such acquittance and discharge, and shall, in case of payment to the alien property custodian of any debt or obligation owed to an enemy or ally of enemy deliver up any notes, bonds or other evidences of indebtedness or obligation, or any security therefor in which such enemy or ally of enemy had any right or interest that may have come into the possession of the alien property custodian, with like effect as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor, or obligee."

Extracts from Executive Order of February 26, 1918.

Sec. 1 (c). "The words 'right,' 'title,' 'interest,' 'estate,' 'power,' and 'authority' of the enemy, as used herein, shall be deemed to mean respectively such right, title, interest, estate, power, and authority of the enemy as may actually exist and also such as might or would exist if the existing state of war had not occurred, and shall be deemed to include respectively the right, title, interest, estate, power, and authority in law or equity or otherwise of any representative of or trustee for the enemy or other person claiming under or in the right of, or for the benefit of, the enemy."

Sec. 2 (a). "A demand for the conveyance, transfer, assignment, delivery, and payment of money or other property, unless expressly qualified or limited, shall be deemed to include every right, title, interest, and estate of the enemy in and to the money or other property demanded as well as every power and authority of the enemy thereover."

Sec. 2 (c). "When demand shall be made and notice thereof given, as hereinbefore provided, such demand and notice shall forthwith vest in the Alien Property Custodian such right, title, interest, and estate in and to and possession of the money or other property demanded and such power or authority thereover as may be included within the demand, and the Alien Property Custodian may thereupon proceed to administer such money and other property in accordance with the provisions of the 'Trading with the enemy Act,' and with any orders, rules, or regulations heretofore, hereby, or hereafter made by me or heretofore or hereafter made by the Alien Property Custodian."

Sec. 3 (d). "The Alien Property Custodian may exercise any right, power or authority of the enemy in, to, and over corporate stock, shares, or certificates representing beneficial interests owing or belonging to or held for, by, on account of, or on behalf of or

for the benefit of an enemy, including (1) the right to receive all notices issued by the corporation, unincorporated association, company, or trustee which issued such stock, shares, or certificates, to the holders or owners of similar stock, shares, or certificates, (2) the right to exercise all voting power appertaining to such stock, shares, or certificates, and (3) the right to receive all subscription rights, dividends, and other distributions and payments, whether of capital or income, declared or made on account of such stock, shares, or certificates, regardless of whether or not such stock, shares, or certificates be in the possession of the Alien Property Custodian and regardless of whether or not such stock, shares, or certificates have been transferred to the Alien Property Custodian upon the books of the corporation, association, company, or trustee issuing the same."

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To Stoehr & Sons, Inc.,

Address, 200 Fifth Ave., New York City:

I, A. Mitchell Palmer, Alien Property Custodian, duly appointed, qualified, and acting under the provisions of the Act of Congress known as the "Trading with the enemy Act," approved October 6, 1917, and the executive orders issued in pursuance thereof, by virtue of the authority vested in me by said act, and by said executive orders, after investigation do determine that: Eduard Stoehr, whose
(Name of enemy or ally of enemy.)
address is Leipzig, Germany, is an enemy (not holding a license
(Last known address.)

granted by the President), and has a certain right, title, and interest in and to 1,875 shares of Common stock standing on your books
(Common, preferred.)

in the name of Eduard Stoehr.

I, as Alien Property Custodian, do hereby require that you shall convey, transfer, assign, and deliver to me as Alien Property Custodian, to be by me held, administered, and accounted for as provided by law, every right, title, and interest of the said enemy in said stock, including in respect to the said stock the right which the said enemy may have, (a) to receive all notices issued by you to the holders or owners of similar stock, shares, or certificates; (b) to exercise all voting power appertaining to such stock, shares, or certificates; (c) to receive all subscription rights, dividends, and other distributions and payments, whether of capital or of income, declared or made on account of such stock, shares, or certificates.

I, as Alien Property Custodian, do hereby further require that you note the substance of this demand upon your stock books and/or stock ledger, and that you furnish a copy of this demand to the registrar and/or transfer agent, if any, of the stock in respect to which this demand is made.

I, as Alien Property Custodian, do hereby further require that within ten days from the service of this demand upon you, you report to me any and all acts which you have done, or omitted to do, pursuant to the requirements of this demand.

Until otherwise directed, you will remit to the Alien Property Custodian at Washington, by check payable to his order, all payments, whether of capital or income, now or hereafter declared or due on account of such stock, shares, or certificates, and you will direct such notices in respect to the said stock, shares, or certificates to the Alien Property Custodian.

This demand is supplementary to any demand which may hitherto have been made upon you, accompanied by the presentation of certificates which represent shares or beneficial interests, for the transfer into my name, as Alien Property Custodian, of such certificates, or for the transfer thereof into the name of any nominee of me as Alien Property Custodian, and this demand shall not prejudice or affect any demand accompanied by such certificates which has been, or which may hereafter be, made.

Witness my hand and seal of office, this sixth day of August, 1918.

A. MITCHELL PALMER,
Alien Property Custodian,
By J. L. DAVIS,
Managing Director.

G. B. L.

The foregoing exhibit contained a rider on the face thereof as follows:

"A. P. C.—M. M.—188—Rev.

You are hereby instructed to remit all accumulated dividends direct to this office upon receipt hereof. If checks for accumulated dividends have heretofore been drawn in favor of the enemy and are now held by you, you may send such checks direct to this office. All future dividends shall be remitted to Peoples Bank & Trust Co. as depository for Alien Property Custodian. Trust No. E-1293 which has been duly designated as the depository of this trust.

You will also direct all notices hereby demanded to said depository and identify each notice by the trust number hereof."

On the back of said exhibit was the following admission of service:

"Service of the within demand accepted this 20th day of August, 1918.

STOFHR & SONS INC.,
By MAX W. STOFHR,
Secy."

468 Defendants' Exhibit F-1 was upon the same form, A. P. C. Form No. 106-A, upon which Defendants' Exhibit E-1 was made, and was dated August 6, 1918, and demanded the stock of Georg Stofhr & — Leipzig, Germany in Stofhr & Sons, Inc. consisting of 222.21 shares of common stock and was in other respects

identical with Defendants' Exhibit E-1. Defendants' Exhibit F-1 had endorsed upon the back thereof the following:

"Service of the within demand accepted this 29th day of August, 1918.

STOEHR & SONS, INC.,
By MAX W. STOEHR,
Secy."

469

DEFENDANTS' EXHIBIT G-1.

A. P. C. Form No. 106.

Report No. 3164.
Trust No. F-1293-Z

Original.

Alien Property Custodian.

Demand by Alien Property Custodian for Property.

Extracts from "Trading with the Enemy Act."

Sec. 7 (c). "If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian."

Sec. 7 (e). "No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.

"Any payment, conveyance, transfer, assignment, or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. The alien property custodian and such other persons as the President may appoint shall have power to execute, acknowledge, and deliver any such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such acquittance and discharge, and shall, in case of payment to the alien property custodian of any debt or obligation owed to an enemy or ally of enemy, deliver up any notes, bonds, or other evidences of indebtedness or obligation, or any security therefor in which such enemy or ally of enemy had any right or interest that may have come into the possession of the alien property custodian, with like effect as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor, or obligee."

To Max W. Stoehr,

Address, 136 Pennington Ave., Passaic, New Jersey:

I, A. Mitchell Palmer, Alien Property Custodian, duly appointed, qualified and acting under the provisions of the Act of Congress known as the "Trading with the enemy Act," approved October 6, 1917, and the executive orders issued in pursuance thereof, by virtue of the authority vested in me by said act, and said executive orders, after investigation do determine that the following property, to wit:

All that certain money and property mentioned and particularly described in your report to the Alien Property Custodian, dated December 3rd, 1917, as owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of the "person" hereafter mentioned and determined to be an enemy, together with all interest accrued thereon to date of payment to the Alien Property Custodian, and all dividends or accumulations thereon whatsoever now in your possession, or which may hereafter come into your possession.

The Passaic Tr. & Safe Dep. Co. is hereby designated as depository, and is authorized to receive for and on behalf of the Alien Property Custodian the property herein mentioned, and upon the service of this demand on you by said depository, you are directed to deliver the said property to it forthwith. For money demanded, checks may be delivered to depository, which in all cases should be made payable to the Alien Property Custodian.

is by you owing and belonging to and held for, by, on account of, and on behalf of, and for the benefit of Eduard Stoehr, Address: Leipzig, Germany, whom after investigation I do determine to be an enemy not holding a license granted by the President, and I hereby require that the said money and property shall be by you conveyed, transferred, assigned, delivered, and paid over to me as Alien Property Custodian to be by me held, administered, and accounted for as provided by law.

Witness my hand and seal of office, this 4th day of March, 1918.

A. MITCHELL PALMER,

Alien Property Custodian,

By J. L. DAVIS.

Alien Property Custodian, Washington, D. C.

Inclosure No. 15286.

On the back of the foregoing exhibit was the following admission of service:

"Service of the within demand accepted this 8th day of March, 1919.

MAX W. STOEHR."

469½

DEFENDANTS' EXHIBIT H-1.

Defendants' Exhibit H-1 was on the same form as Defendants' Exhibit G-1, namely A. P. C. form No. 106, was dated March 4, 1918, was addressed to Max W. Stoehr and demanded the voting trust certificate for 222.21 shares of the common stock of Stoehr & Sons, Inc., held by Max W. Stoehr as trustee for Georg Stoehr, of Leipzig, Germany. Defendants' Exhibit H-1 was endorsed as follows: "Service of the within demand accepted this 8th day of March, 1918. Max W. Stoehr."

470

DEFENDANTS' EXHIBIT I-1.

Trust No. 532.
1293.

Report No. 4845.
4845.

(Duplicate Original.)

Demand by Alien Property Custodian.

To Stoehr & Sons, Inc. (a corporation):

To Max W. Stoehr, as Trustee, and Individually:

I, Francis P. Garvan, Alien Property Custodian, duly appointed, qualified, and acting under the provisions of the Act of Congress known as the "Trading With the Enemy Act," approved October 6, 1917, and the amendments thereto, and the proclamations and executive orders issued in pursuance thereof, by virtue of the authority vested in me by said Act, said proclamations and executive orders, after investigation do determine that:

Those certain shares of the capital stock of said Stoehr & Sons, Inc., a corporation, heretofore registered and standing upon the books of said Stoehr & Sons, Inc., in the name of the person or persons listed in Column No. 1 of the schedule marked "Exhibit A" attached hereto and made a part hereof (said schedule being identified by the signature Abbie A. Baker on the margin thereof), and evidenced or represented by a certificate or certificates numbered as specified in Column No. 2 of said schedule on the same line with the name of the person in whose name said stock was registered or stood, of the number and class of shares listed in Column No. 3 of said schedule on the same line as aforesaid, which said shares of stock (together with other and additional shares of the same kind not included within the following seizure or requirements) were subsequently registered or attempted to be registered on the books of said Stoehr & Sons, Inc., in the names of said Hans E. Stoehr, Max W. Stoehr and Georg G. Röhlig as voting trustees, and (together with such other and additional shares not included within the following seizure or requirements) evidenced or represented or attempted to be evidenced or represented by Certificate No. 5, in the name of said Hans E. Stoehr, Max W. Stoehr and Georg Röhlig as voting Trustees.

Belong to and are by you held for, on account of, on behalf of, or for the benefit of the person or persons listed in the same line therewith in Column No. 4 of said schedule.

I, as such Alien Property Custodian, after investigation have heretofore determined and do hereby determine that said persons whose names are listed in said Column No. 4 and whose addresses are given in Column No. 5 on the same line therewith, are enemies and each of them is an enemy, not holding a license granted by the President within the Purview of said Act as amended and said proclamations and executive orders issued in pursuance thereof.

As such Alien Property Custodian, by virtue of the authority vested in me, I do hereby seize such shares of stock and each
471 and all of them, and do require that the same be by you transferred, assigned, and delivered to me; and said Stoechr & Sons, Inc., is hereby required to cancel forthwith upon its books and records all of the said shares of stock listed in said schedule and subsequently registered, evidenced or represented or attempted to be registered, evidenced or represented as aforesaid, and in lieu thereof to issue new certificates respectively in the name of the person or persons as specified in Column No. 6 of said schedule.

This demand is supplementary to any demands which may have been heretofore made upon you with respect to said shares or certificates and shall not prejudice or affect any such demands or any rights acquired by virtue thereof.

Witness my hand and seal of office, this fifth day of March, 1919.

FRANCIS P. GARVAN,
Alien Property Custodian.

[SEAL.]

W. S. PLACE.

Approved for execution.
(Sgd.)

SPYER WHITTAKER,
Bureau of Law.

3/3/19.

Service of the above demand accepted this 13th day of March 1919.

(Sgd.)

STOEHR & SONS, INC.,
By LOUIS HESSE,
Treas.

Service of the within demand accepted this — day of March, 1919.

As Trustee and Individually.

472

EXHIBIT A.

Attached to Demand Issued by the Alien Property Custodian, Dated the Fifth Day of March, 1919, and Identified by the Following Signature: Abbie A. Baker.

1	2	3	4	5	6
Name of person in whose name shares of stock or other beneficial interests stand or stood.	Certificate No.	Number and kind of shares.	Name of enemy for, on account of, or on behalf of whom shares of stock or other beneficial interests are or were held.	Address.	Name to whom new certificate to be issued.
Max W. Stochr...	1	1875	.....Eduard Stochr... Leipzig, Germany,	Francis P. Garvan, as Alien Property Custodian, Trust No. 1,293.	
Max W. Stochr...	3	223 21/100.....	.....Georg Stochr... Leipzig, Germany,	Francis P. Garvan, as Alien Property Custodian, Trust No. 532.	

473 Annexed to Defendants' Exhibit I-1 and forming a part thereof was the affidavit of Paul Kieffer, sworn to March 28, 1920, that on March 28, 1920, at 115 Broadway, Borough of Manhattan, New York City, he served the demand, Defendants' Exhibit I-1, addressed to Stoehr & Sons, Inc., and to Max W. Stoehr as trustee and individually, upon Max W. Stoehr as trustee and individually, said Max W. Stoehr being one of the persons upon whom said demand was made, by delivering to said Max W. Stoehr a true and correct copy of said demand and leaving the same with him and that said Paul Kieffer knew the person so served to be the person mentioned and described in said demand as Max W. Stoehr as trustee and individually.

474 DEFENDANTS' EXHIBIT J-1.

(Duplicate Original.)

Trust No. 532.

Report No. 4845.

Report No. —.

Trust No. 1293.

Report No. 4845.

Report No. —.

Demand by Alien Property Custodian.

Copy to Stoehr & Sons, Inc. (a corporation).

To Max W. Stoehr, as Voting Trustee and as Trustee and Individually:

I, Francis P. Garvan, Alien Property Custodian, duly appointed, qualified, and acting under the provisions of the Act of Congress known as the "Trading With the Enemy Act," approved October 6, 1917, and the amendments thereto, and the proclamations and executive orders issued in pursuance thereof, by virtue of the authority vested in me by said Act, and said proclamations and executive orders, after investigation do determine that:

Those certain Voting Trust Certificates representing or purporting to represent shares of common capital stock of Stoehr & Sons, Inc., (a corporation), which said Voting Trust Certificates were heretofore registered or standing upon the books of Max W. Stoehr, Hans E. Stoehr and Georg H. Roehlig, voting trustees, as follows:

Voting trust certificate numbers.	Number of shares represented or purported to be represented.	Voting trust certificates issued to—	Voting trust certificates held for—	Address of person for whom held.
1	1,875	Max W. Stoehr Trustees	Eduard Stoehr	Leipzig, Germany
3	223.21	Max W. Stoehr Trustee	Georg Stoehr	Leipzig, Germany

which said Voting Trust Certificates represent or purport to represent shares of the common capital stock of said Stoebr & Sons, Inc., as indicated above, theretofore registered and standing upon the books of said Stoebr & Sons, Inc., and evidenced or represented by stock certificates of Stoebr & Sons, Inc., bearing the same certificate numbers and for the same numbers of shares as the Voting Trust Certificates listed in the above schedule; together with any and all rights, privileges and benefits of said Eduard Stoebr and said Georg Stoebr in any way arising out of the creation of said Voting Trust or evidenced by said Voting Trust Certificates.

Belong to and are by you held for, on account of, on behalf of, or for the benefit of Eduard Stoebr and said Georg Stoebr, respectively, as indicated in the above schedule.

I, as such Alien Property Custodian, after investigation have heretofore determined and do hereby determine that said Eduard Stoebr and said Georg Stoebr are enemies and that each of them is an enemy not holding a license granted by the President within the purview of said Act as amended and said proclamations and executive orders issued in pursuance thereof.

475 As such Alien Property Custodian, I do hereby seize said Voting Trust Certificates and each and all of them, together with any and all rights, privileges and benefits of said Eduard Stoebr and said Georg Stoebr in any way arising out of the creation of said Voting Trust or evidenced by said Voting Trust Certificates, and do require that the same be by you transferred, assigned and delivered to me; and you are hereby required to cancel forthwith upon your books and records all of the said Voting Trust Certificates and in lieu of said Voting Trust Certificate No. 1 to issue new Voting Trust Certificate in the name of "Francis P. Garvan, as Alien Property Custodian, Trust No. 1293," and in lieu of said Voting Trust Certificate No. 3 to issue new Voting Trust Certificate in the name of "Francis P. Garvan, as Alien Property Custodian, Trust No. 532."

This demand is supplementary to any demands which have been heretofore made upon you with respect to said shares of stock and/or said Voting Trust Certificates and shall not prejudice or affect any such demands or any rights acquired by virtue thereof.

Witness my hand and seal of office this 10th day of March, 1919.
[SEAL.]

FRANCIS P. GARVAN,
Alien Property Custodian.

W. S. PLACE.

Approved for execution March 7, 1919.

(Sgd.)

SPIER WHITAKER,
Bureau of Law.

Service of the above demand accepted this 13th day of March, 1919.

(Sgd.)

STOEHR & SONS, INC.,
By LOUIS HESSE,
Treas.

Service of the within demand accepted this — day of March, 1919.

*As Voting Trustee and as
Trustee and Individually.*

Annexed to Defendants' Exhibit J-1 was the affidavit of Paul Kieffer sworn to March 20, 1919 that on March 20, 1919, at 115 Broadway, Borough of Manhattan, New York City he served the annexed demand, Defendants' Exhibit J-1, upon Max W. Stoehr, as voting trustee and as trustee and individually, one of the persons upon whom said demand was made, by delivering to said Max W. Stoehr a true and correct copy of said demand and leaving the same with him, and that he, the said Paul Kieffer, knew the person so served to be the person mentioned in said demand as Max W. Stoehr as voting trustee and as trustee and individually.

DEFENDANTS' EXHIBIT K-1.

(Duplicate Original.)

1293.

Trust No. 532.

Report No. 37925.

Demand by Alien Property Custodian.

To Stoehr & Sons, Inc. (a corporation), 200 5th Avenue (120 Broadway), New York City:

To Max W. Stoehr:

To Lotte Stoehr, executrix of estate of Hans E. Stoehr:

I, Francis P. Garvan, Alien Property Custodian, duly appointed, qualified, and acting under the provisions of the Act of Congress known as the "Trading With the Enemy Act," approved October 6, 1917, and the amendments thereto, and the proclamations and executive orders issued in pursuance thereof, by virtue of the authority vested in me by said Act, and said proclamations and executive orders, after investigation do determine that Eduard Stoehr (address Leipzig, Germany) and Georg Stoehr (address Leipzig, Germany) are enemies and that each of them is an enemy not holding a license granted by the President within the purview of said Act as amended and said proclamations and executive orders; and that said persons on, to wit, February 3, 1917, and prior thereto, were partners in the co-partnership of Stoehr & Sons conducted in the City of New York, State of New York, and elsewhere, and that said persons as such partners now have the following proportionate interests, to wit:

Eduard Stoehr Forty-two Fifty-sixths (42/56)

Georg Stoehr Five Fifty-sixths (5/56)

in and to all of the property and assets of said co-partnership, and in and to all of the property and assets of said co-partnership of every kind, character, and description held on February 3, 1917, by said co-partnership or in its name, or for it, or on its behalf, and in and

to all accumulations and additions thereto, profits arising therefrom, and interest thereon, which said co-partnership and all of its assets were subsequently, to wit, on February —, 1917, conveyed, transferred, assigned, delivered, and paid over, or attempted to be conveyed, transferred, assigned, delivered, and paid over to said Stoehr & Sons, Inc., a corporation.

As such Alien Property Custodian, I do hereby seize said interests of said enemies in and to said partnership, and in and to all property and assets of every kind, character, and description held on February 3, 1917, by said co-partnership or in its name, or for it, or in its behalf, and in and to all accumulations, and additions, and in and to the profits arising therefrom, and interest thereon, and do require that the same shall be by you conveyed, transferred, assigned, delivered, and paid over to me as Alien Property Custodian, to be by me as such official held, administered and accounted for as provided by law.

This Demand is supplementary to any demands which may have been heretofore made with respect to shares of stock of said enemies in Stoehr & Sons, Inc., and / or voting trust certificates representing, or purporting to represent, such shares, and shall not prejudice or affect any such demands, or any rights acquired by virtue thereof.

Witness my hand and seal of office, this 10th day of March, 1919.
[SEAL.] FRANCIS P. GARVAN,

Alien Property Custodian.

W. S. PLACE.

Approved for execution March 7, 1919.

(Sgd.)

SPIER WHITAKER,

Bureau of Law.

On the back of the foregoing exhibit were the following admissions of service:

"Service of the within demand accepted this 13th day of March 1919.

STOEHR & SONS, INC.,
By LOUIS HESSE,
Treasurer."

"Service of the within demand accepted this 24th day of March 1919.

LOTTE STOEHR,
Executrix of Estate of Hans E. Stoehr."

"Service of the within demand accepted this 28th day of March 1919.

MAX W. STOEHR."

478

DEFENDANTS' EXHIBIT L-1.

Trust No. 4017.

Report No. 1869.

(Duplicate Original.)

Demand by Alien Property Custodian.

To Stochr & Sons, Inc.,

Address 200 Fifth Avenue (120 Broadway), New York City:

I, A. Mitchell Palmer, Alien Property Custodian, duly appointed, qualified, and acting under the provisions of the Act of Congress known as the "Trading with the Enemy Act," approved October 6, 1917, and the Amendments thereto, and the Proclamations and Executive Orders issued in pursuance thereof, by virtue of the authority thus vested in me, after investigation do determine that Kammgarn Spinnerei Stochr & Co., Aktiengesellschaft, of Plagwitz-Leipzig, Germany, is an enemy not holding a license granted by the President within the purview of the said Act as amended and said proclamations and Executive Orders.

As such Alien Property Custodian, after investigation I do further determine that:

all those certain rights, privileges and benefits created in favor of and granted to Kammgarnspinnerei Stochr & Co., Aktiengesellschaft, said enemy, by the terms of that certain contract entered into between said Stochr & Sons, Inc. and said enemy, dated the 20th day of February, 1917, with respect to certain 14,900 shares of the common capital stock of Botany Worsted Mills, a corporation, a copy of which said contract is attached hereto marked "Exhibit A."

Belong to or are held by you for, on account of, on behalf of, or for the benefit of said enemy Kammgarnspinnerei Stochr & Co., Aktiengesellschaft.

I, as such Alien Property Custodian hereby seize every such right, privilege and benefit created in favor of and granted to said enemy by said contract, including every power and authority thereover which might or could be exercised by said enemy whether presently payable or deliverable, or payable or deliverable in the future,

479 or to be exercised presently or in the future, and as such Alien Property Custodian, I do require that all of said property shall be by you conveyed, transferred, assigned, delivered and paid over to me as such Alien Property Custodian to be by me held, administered and accounted for as provided for by law.

This demand shall not prejudice or affect any demands heretofore or hereafter made with respect to said 14,900 shares of the common capital stock of Botany Worsted Mills or any rights, privileges or benefits acquired by virtue thereof.

Witness my hand and seal of office this 26th day of February, 1919.

[SEAL.]

A. MITCHELL PALMER,

Alien Property Custodian.

W. S. PLACE.

Service of above demand accepted this 13th day of March, 1919.
STOEHR & SONS, INC.,

By **LOUIS HESSE,**
Treas.

480 Exhibit A attached to the foregoing demand and forming part of Exhibit L-1 was a copy of Defendants' Exhibit A, printed in full among these exhibits, and for that reason said Exhibit A is not printed here.

481

DEFENDANTS' EXHIBIT M-1.

Stoehr & Sons, Inc.

January 14, 1918.

Annual stockholders' meeting at 200 Fifth Ave., 4.00 P. M.
 Election of Directors as follows:

Hans E. Stoehr.
 Max W. Stoehr.
 George G. Roehlig.
 Alfred de Liagre.

January 14, 1918.

Directors' meeting at 200 5th Avenue, 4.15 P. M. Election of Officers as follows:

President, Hans E. Stoehr.
 Vice-President, Georg G. Roehlig.
 Secretary, Max W. Stoehr.
 Treasurer, " " "
 Asst. Secretary, Alfred de Liagre.
 Asst. Treasurer, " " "

March 20, 1918.

Directors' meeting at 200 5th Avenue, 5.30 P. M. James N. Wallace elected director in place of Hans E. Stoehr deceased. Alfred de Liagre resigned as director; Francis P. Garvan elected. Georg G. Roehlig resigned as director; Andrew S. Duvall elected.

New board of directors as follows:

James N. Wallace.
 Francis P. Garvan.
 Andrew B. Duvall.
 Max W. Stoehr.

April 30, 1918.

Directors' meeting at 54 Wall Street, 1.20 P. M. James N. Wallace elected President in place of Hans E. Stoehr deceased. Max W. Stoehr resigned as Treasurer and Louise Hesse was elected in his place.

October 14, 1918.

Directors' meeting at 54 Wall Street—2.30 P. M. Max W. Stoeck resigned as Director and secretary. Paul Kieffer was elected Director in place of Max W. Stoeck. Justus Sheffield was elected Secretary in place of Max W. Stoeck.

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November 20, 1918.

Directors' meeting at 54 Wall Street—2.00 P. M. Mr. Paul Kieffer was elected Vice-President.

March 28, 1919.

Directors' meeting at 80 Broadway—2.30 P. M.

Mr. Garvan resigned as director March 10, 1919. His resignation was submitted to and accepted at the meeting of March 28, 1919, and Colonel Douglas I. McKay was elected director in his place at said meeting. (Page 27 of Minute Book.)

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DEFENDANTS' EXHIBIT N-1.

Defendants' Exhibit N-1 consisted of the following extracts from the minutes of a special meeting of the board of directors of Stoeck & Sons, Inc., held November 12, 1918, said extracts being as follows:

(1) *Minutes of Last Previous Meeting Held November 1, 1918.*

The minutes of the meeting of the board held on November 1, 1918, were presented, and upon motion, duly seconded and carried, the said minutes were approved and their reading dispensed with.

(2) *Sale of 1,290 Shares of Stock of the Botany Worsted Mills Held by the Company.*

Mr. Quinn reported that at the last meeting of the Board a resolution was adopted authorizing the sale by the Company of 1,290 shares of stock of the Botany Worsted Mills held by the Company, said sale to be made jointly with the Alien Property Custodian, who will at the same time offer 24,410 shares of the stock of the Botany Worsted Mills held by the Alien Property Custodian. The said resolution was adopted after Mr. Quinn had read to the board the terms and conditions of sale then prepared by the Alien Property Custodian. Since the last meeting the same terms and conditions of sale have been amended.

484 Mr. Quinn further reported that the most important change that has been made in the terms of sale is that the Alien Property Custodian and Stoeck & Sons Inc. will make a

joint offer of 25,700 shares to be offered as an entirety. There will be no separate offering of the 1,290 shares of stock held by Stoehr & Sons Inc.

Mr. Quinn thereupon presented to the Board the amended terms and conditions of sale.

Upon motion, duly seconded and carried, the following resolutions were unanimously adopted:

"Resolved that it is to the best interests of this Company to offer for sale at public auction 1,290 shares of the stock of the Botany Worsted Mills owned and held by this Company and standing in its name on the books of the Botany Worsted Mills; and it is

Further resolved that the officers of this Company be and they hereby are authorized to offer said 1,290 shares of stock for sale as a portion of a lot consisting of 25,700 shares of stock of the Botany Worsted Mills in all respects as is set forth in the order of sale and terms and conditions of sale promulgated by the Alien Property Custodian, on Monday, December 2, 1918, of 24,410 shares of the stock of Botany Worsted Mills held by the Alien Property Custodian jointly with the sale by this Company of the said 1,290

485 shares standing in its name on the books of the Botany Worsted Mills; and the officers of this Company be and they hereby are authorized to assign and deliver the certificates for said 1,290 shares of the stock of the Botany Worsted Mills to the purchasers at said sale to be held by the Alien Property Custodian as aforesaid.

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DEFENDANTS' EXHIBIT O-1.

The General Trade License of the Department of State, War Trade Board, Section, dated July 14, 1919, authorized persons in the United States on and after July 14, 1919, "to trade and communicate with persons residing in Germany," subject to certain limitations therein defined. The license of July 20, 1919, contained definitions regarding trading in dyes and dyestuff. The license of July 20, 1919, further extended the license "to trade and communicate with persons residing in Germany," the only exemptions relating to the importation from Germany into the United States or elsewhere of dyes, dyestuffs, potash, drugs or chemicals which have been produced or manufactured in Germany, and provided that said license should not affect present restrictions upon trade and communication between the United States and Hungary, or that portion of Russia under the control of the Bolshevik authority, and contained certain other limitations not material to the issues in this case.

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DEFENDANTS' EXHIBIT P-1.

Defendants' Exhibit P-1 was a photographic copy of the report by the Botany Worsted Mills, by Thomas Prehn, President, sworn to by Thomas Prehn, December 11, 1917. It was addressed to the Alien Property Custodian. It was stamped upon page one thereof

as follows: "Alien Property Custodian. Received December 12, 1917." The first page thereof designated it as a report by a corporation incorporated within the United States under S-7 (a) of the Trading with the Enemy Act and set forth the penalty for the refusal or failure to make a report, gave instructions as to the making of a report, who must make the report and whose stock must be reported, gave definitions of enemy or ally of enemy as set forth in the law, and was addressed to the Botany Worsted Mills, a New Jersey corporation, at Dayton Avenue, Passaic, New Jersey.

Schedule 2 of said report required said Botany Worsted Mills to state the name of the enemy or ally of enemy, holders of stock, shares or certificates of beneficial interest on or after October 6, 1917, and as part of said schedule said report contained three pages setting forth in column form the following: the names of the registered enemy stockholders of the company, their residences, the number of shares and the numbers of the certificates, "each certificate for 5 shares of \$100 each." Said schedule 2 contained the names and addresses of enemy owners of record of stock of the Botany Worsted Mills, but did not schedule the 14,900 shares in question in this suit belonging to Kammgarnspinnerei Stoehr & Co., of Leipzig. As part of said Schedule 2 the Botany Worsted Mills by Thomas Prehn, President, certified as follows:

NOTE.—The Company also furnishes the Alien Property Custodian with the following information regarding stockholders of the company: * * *

"14,900 shares in the name of Stoehr & Sons, Inc., a New York corporation, in which the Company has reason to believe that Stoehr & Company, a corporation of Leipzig, Germany, has an interest under contract. On and prior to February 3, 1917, said last mentioned corporation had an interest in said shares which then stood in the name of H. E. Stoehr, New York City, and M. W. Stoehr, Passaic, New Jersey, as Trustee. The numbers of the certificates are: 51-1050, 3441-3500, 4061-5000 and 1051-1400, 2004-2017, 2041-2060, 2151-2171, 2861-2884, 2890-2898, 3161-3260, 5251-5309, 5389-5411, 5451-5750 (see also Schedule 4 of this report).

BOTANY WORSTED MILLS.
THOMAS PREHN,

President."

Schedule 4 of said report, Defendants' Exhibit P-1, was as follows:

List of all cases in which the undersigned has reasonable cause to believe that the stock or shares on February 3, 1917, were owned or are owned by an enemy or ally of enemy, though standing on the books in the name of another:

(Here follows table marked page 488.)

*Affidavit of Officer or Representative of Corporation or Association
Making Report.*

STATE OF NEW JERSEY,
County of Passaic, ss:

I swear that I am the president of the corporation making the foregoing report, and that the foregoing report and answers therein made are true and correct.

(Sgd.)

THOMAS PREHN.

Subscribed and sworn to before me this 11th day of December, 1917.

[SEAL.]

(Sgd.)

JOHN SCHMIDT,
Notary Public of N. J.

489 *Instructions for Printer Regarding Printing of Defendants'
Exhibit Q-1.*

The spaces in the report need not be left blank in the printing, and the unfilled blank affidavits at the end need not be included in the printing.

The page of endorsements on the back need not be printed.

490 DEFENDANTS' EXHIBIT Q-1.

Alien Property Custodian, Received Dec. 5, 1917. Noted ———.
Date ———, Ansd. ———, Date ———.

A. P. C. Form No. 100.

File No. ———.

Alien Property Custodian.

Report of Property and Indebtedness under Section 7 (a), Trading with the Enemy Act. (General.)

Penalty.

Failure to make this report to the Alien Property Custodian as provided by law (see extract of act below) is punishable by imprisonment for not more than ten years or fine of not more than ten thousand dollars, or both.

The time for the filing of any report which under the act was required to be filed on or before November 5, 1917, has been extended to and including December 5, 1917.

Pursuant to the provisions of section 7 (a) of the "Trading with the enemy Act," the Alien Property Custodian hereby requires a written statement under oath containing all the particulars specified in this form.

Instructions.

(1) Read carefully all of this report form, note the grouping of the several classes of property, and read instructions before beginning to make report. Write legibly, using typewriter where possible.

(2) Person.—The word "person" is defined by section 2 of the act as follows:

"The word 'person,' as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic."

(3) The person whose property (including indebtedness owing him) must be reported.—Report must be made of the property or indebtedness to any person who, by the "Trading with the enemy Act," is defined as an enemy or ally of enemy or whom the person making this report may have reasonable cause to believe to be an enemy or ally of enemy.

(4) Enemy.—For the purpose of this report, the word "enemy," as defined by section 2 of the act, includes the following:

"(a) Any individual partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

"(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof."

Ally of enemy.—For the purpose of this report, the words "ally of enemy," as defined by section 2 of the act, include the following:

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

"(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof."

(5) If a person, even an American citizen, is resident within the territory of an enemy or ally of enemy, including that occupied by its military and naval forces, his property must be reported.

(6) The term "enemy" or "ally of enemy," as used in this form, includes any person whom you may have reasonable cause to believe to be an enemy or ally of enemy.

(7) On October 6, 1917, the United States was at war with Germany; the allies of Germany were Austria-Hungary, Bulgaria, and Turkey.

(8) Who must make this report, and what must be reported.—This report must be made by the persons described in the following paragraph of the act:

"Any person in the United States who holds or has or shall hold or have custody or control of any property beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of enemy, or of any person whom he may have reasonable cause to believe to be an enemy or ally of enemy and any person in the United States who is or shall be indebted in any way to an enemy or ally of enemy, or to any person whom he may have reasonable cause to believe to be an enemy or ally of enemy, shall, with such exceptions and under such rules and regulations as the President shall prescribe, and within thirty days after the passage of this act, or within thirty days after such debt shall become due, report the fact to the alien property custodian by written statement under oath containing such particulars as said custodian shall require. The President may also require a similar report of all property so held, of, for, or on behalf of, and of all debts so owed to, any person now defined as an enemy or ally of enemy, on February third, nineteen hundred and seventeen."

The Alien Property Custodian, acting under the authority vested in him by the President, including all power and authority to require lists and reports, has issued an order requiring a report of all property so held, and of all debts so owed, on February 3, 1917. If on February 3, 1917, the person reporting so held any property of, for, or on behalf of the person named in division B hereof, or was indebted in any way to such person, an additional report as of February 3, 1917, must be made, unless all such property and indebtedness are included in this report.

(9) The following reports, covered by special forms, are not to be included herein:

(a) Lists required to be filed by corporations incorporated within the United States, unincorporated associations, companies, or trustees within the United States, issuing shares or certificates representing beneficial interests, as to the enemy or ally of enemy officers, directors, or stockholders thereof. (A. P. C. Form No. 101.)

(b) Reports by insurance companies as to all policies of insurance of value, in which an enemy or ally of enemy has any interest. (A. P. C. Form No. 102.)

(c) Reports by banking institutions having no property on hand of an enemy or ally of enemy or owing no debt to an enemy or ally of enemy, except an open bank account. (A. P. C. Form No. 103.)

(d) Reports by corporations or persons leasing safe deposit boxes to enemy or ally of enemy or to lessees in trust for enemy or ally of enemy and to which the lessors have not access. (A. P. C. Form No. 104.)

(e) Executors, administrators, guardians, trustees, receivers, and others acting in a like fiduciary or representative capacity, in respect of property in which an enemy or ally of enemy has an interest. (A. P. C. Form No. 105.)

491 3/4/18 Demand made. A. B. D. T. B.

(10) Miscellaneous.—Make separate reports on separate blanks for each person whose property (including indebtedness owing him) is being reported.

(11) Do not leave any schedule or question unanswered. If a negative answer is intended, write "None" or "No."

(12) If the space provided in any schedule in this form is inadequate, a complete schedule in like form and bearing the corresponding schedule number must be prepared, signed, attached to this report, and made a part hereof. Do not put a part of the information in the space on this form and part on an attached sheet.

(13) If the person making the report holds any of the property mentioned in any of the schedules jointly with others, this fact must be stated in such schedules, with the names and addresses of the joint holders or custodians. Persons holding property jointly may report jointly.

To Alien Property Custodian,
Washington, D. C.

The undersigned, in pursuance of the act of Congress known as the "Trading with the enemy Act," approved October 6, 1917, hereby makes the following written statement containing the particulars required by the Alien Property Custodian (except as reported on special forms) of all the property, beneficial or otherwise, which the undersigned on October 6, 1917, held, had, or had custody or control of, or now holds, has, or has custody or control of, alone or jointly with others, of, for, or on behalf of the herein-named enemy or ally of enemy, or person whom the undersigned may have reasonable cause to believe to be an enemy or ally of enemy; and of all indebtedness owing on or after October 6, 1917, by the undersigned to such enemy or ally of enemy or person whom the undersigned may have reasonable cause to believe to be an enemy or ally of enemy, to wit:

A.

Name of individual, partnership, association, or corporation making report: Max W. Stohr.

Address: 136 Pennington Avenue, Passaic, New Jersey.
(No.) (Street.) (City.) (County.) (State.)

B.

Name of enemy or ally of enemy or person whom person reporting may have reasonable cause to believe to be an enemy or ally of enemy whose property (including indebtedness owing him) is being reported: Eduard Stohr.

Last known residence or address Leipzig, Germany.

(Give the residence or address of the person whose property is being reported, as the same is registered or recorded on the books of the person reporting, together with any information showing any subsequent change of residence or address.)

Of what country (if known to person reporting) is person whose property is being reported a subject or citizen? Germany.

SCHEDULE 1.

Money, Checks, and Drafts Payable on Demand.

This schedule includes gold, silver, currency, checks, and drafts payable on demand. (Time drafts and bank accounts should be included under Schedule 8.)

Money § None.

Give detailed description, date, bank, drawer or maker, payee, endorser, number of check and amount, place of payment, and the capacity in which the same is held. If any check or draft scheduled is for any reason worth less than its par value, this fact should be stated in this schedule.

Checks None.

Drafts payable on demand None.

SCHEDULE 2.

Stocks and Bonds.

This schedule includes financial securities, such as certificates of stock, issues of notes and debentures of corporations, associations, companies, or trustees, including certificates representing beneficial interests; bonds and coupons of corporations, countries, states, counties, cities, and subdivisions thereof; and all financial securities commonly dealt in by bankers brokers, and investment houses.

(The list of officers, directors, and stockholders of corporations and unincorporated associations or companies or trustees issuing

shares or certificates representing beneficial interests, required by the first two paragraphs of section 7 (a) of "Trading with the enemy Act," should be made on a separate form (A. P. C. Form No. 101), which will be furnished on request, and the list there called for should not be included in this report.)

Give in detail name of the corporation or person issuing stock, shares, or certificates representing beneficial interests, bonds, or securities, and class or issue thereof, record or registered owner, par value or principal amount of same, number of shares (if any), and serial numbers of all instruments; state where the same are located, and estimated market value of each item.

Voting Trust Certificate No. 1 for 1,875 shares of stock of Stoehr & Sons Inc., a New York corporation of 200 Fifth Avenue. The certificate is in my name and possession as trustee, but I have no beneficial interest in the same, but same belongs to said Eduard Stoehr. Par value \$100 a share. As the stock is not in the market cannot give market value but estimate its value at about \$350 per share.

SCHEDULE 3.

Equity of Enemy or Ally of Enemy in Mortgaged or Pledged Property and Interest of Enemy or Ally of Enemy in Contracts Mentioned in Section 8 (a).

This schedule includes the property and contracts mentioned in section 8 (a) of "Trading with the enemy Act," which provides: "That any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, and any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property, and, after default, may dispose of the property in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally."

Describe in detail each item; the nature, value, and location of the property; the nature, amount, and maturity of indebtedness; give dates of all instruments, amounts, due dates and parties to the same; and attach copies of all contracts described in section 8 (a) and of all instruments, if any, creating the mortgage, pledge, lien, or other

right in the nature of security in property; and state estimated value of equity of enemy or ally of enemy therein.

None.

SCHEDULE 4.

Warehouse Receipts and Bills of Lading.

This schedule includes warehouse receipts, bills of lading issued by any carrier, trust receipts, bills of sale, and other evidences of the title or ownership of tangible personal property not in the actual possession of the person reporting.

Give in detail date of instrument, name of person issuing the same, description, location, and estimated market value of the property covered, and nature of interest in instrument or property of person named in Division B hereof.

None.

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SCHEDULE 5.

Goods and Merchandise.

This schedule includes goods, wares, merchandise, chattels, stocks on hand, and tangible personal property in the custody or control of the person reporting, not included in any of the preceding schedules of this report; also ships, or interests in ships, and goods on ships, in which the person named in Division B hereof has any interest.

Describe in detail the property, quantity, location, and the estimated market value thereof.

None.

SCHEDULE 6.

Real Estate Mortgages.

This schedule includes all real estate mortgages where the obligation is held by an enemy or ally of enemy and is secured on specific real estate; all vendors' sales agreements and all land contracts where enemy or ally of enemy is vendor and purchase price of real estate sold by enemy or ally of enemy remains unpaid in whole or in part.

Give full description of indebtedness secured by any mortgage or deed of trust on real estate, together with description of property on which indebtedness is a lien; give amount and maturity of indebtedness, interest, payment dates, rate of interest and copies of all vendors' sales agreements or land contracts, together with statement of amount due and unpaid thereon by purchaser. Also give estimated market value of mortgage and real estate.

None.

SCHEDULE 7.

Real Estate.

This schedule includes real estate, leaseholds, ground rents, options, and contracts relating to real estate, together with rents accrued or to accrue.

Give description of real estate, location, grantor and grantee in deed or other instrument, date of instrument and where recorded; estate held, whether fee simple or otherwise; description of improvements, estimated market value of land and improvements separately; amount of encumbrances, and probable annual net income; names and addresses of tenants, name and address of agent collecting rents; rents accrued and to accrue.

None.

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SCHEDULE 8.

Negotiable Instruments and Debts.

This schedule includes all indebtedness of person making this report to person named in Division B hereof; and all evidences of debt not included in any of the preceding schedules of this report, such as promissory notes, bills of exchange, time drafts, certificates of deposit, bank accounts or deposits, trade acceptances, royalties (other than royalties on patents, trademarks or copyrights), book accounts, accounts payable, judgments, contracts and any debt or obligation not of the character hereinbefore scheduled, in the custody or control of the person making this report, in which the person named in Division B hereof has or may have an interest. All debts, whether due or not, must be reported. Any unpaid instrument owing by you, which to your knowledge was at any time payable to or held by the person named in Division B hereof, must be reported, together with the name and address of present payee or holder, if known.

(1) Describe in detail each item of indebtedness of person reporting, to person named in Division B hereof. Give date of any instruments evidencing such debt or debts, together with date of maturity, rate of interest, date to which interest is paid, place of payment, principal amount unpaid and estimated value thereof. State names of joint makers, if any, and name all parties to instruments or obligations, and if indebtedness is secured in any way, describe the security and state its estimated value.

None.

(2) Describe in detail each evidence of indebtedness held by person reporting, or in his custody or control, of for, or in behalf of person named in Division B hereof; give nature of same, original principal, amount thereof unpaid, rate of interest and to what date paid, when principal and interest due, and estimated value thereof; give

dates of all instruments, amounts, due dates, and parties to or on the same, together with any security held for the payment of any of the obligations and estimated value thereof. Give name of court and court reference to any judgments, and book and page and office where recorded of any recorded instrument.

None.

SCHEDULE 9.

Patents, Trade-Marks, and Copyrights.

This schedule includes all indebtedness incurred under agreements existing prior to the enactment of "Trading with the enemy Act," October 6, 1917, where the holder of the patent, trade-mark, or copyright is the person named in Division B hereof, and does not include sums owing pursuant to any license issued under that act for the use of patents, trade-marks, and copyrights.

Describe the patent, trade-mark, or copyright; give the commonly accepted name thereof, the serial number thereof, and copy of the agreement under which the same is being used, together with a statement of all royalties due or unpaid.

None.

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SCHEDULE 10.

Insurance Policies.

This schedule includes life, fire, accident, marine, and other policies of insurance in which the person named in Division B hereof is the insured or the beneficiary and which policies are in the custody or control of the person reporting. Insurance companies should report on A. P. C. Form No. 102 policies issued by them, and they should not include such policies herein. Any debt owing by way of premium upon policies of insurance or reinsurance to the person named in Division B hereof should be reported under Schedule 8 as a debt.

Describe in detail, giving name of company, number of policy, amount thereof, the description and location of the person or property insured, name of the beneficiary, address of the insured and beneficiary if known, amount due on the policy, if any, to person named in Division B hereof, the liens outstanding on the policy, if any, and also whether the policy is in force and whether any arrangement is in existence for the payment of any premium due or to become due thereon.

None.

SCHEDULE 11.

Safe Deposit Boxes.

This schedule includes all cases where the person reporting has the custody or control of any safe-deposit box in which, or in any of the

contents of which, the person named in Division B hereof has any interest.

Safe-deposit boxes leased by a safe-deposit company or person to enemies or allies of enemy or to lessees in trust for enemies or allies of enemy and to which the lessors have not access, should be reported on A. P. C. Form No. 104.

Give name and address of corporation from which safe-deposit box is rented and number and location of the box. The contents of the box in which the person named in Division B hereof has any interest should be reported in the several appropriate schedules of this report.

None.

SCHEDULE 12.

Report in This Schedule All Other Property, Real, Personal, or Mixed, and Assets and Claims of Every Kind and Description Not Otherwise Designated in the Foregoing Schedules, and Not Required to be Separately Reported, in Which the Person Named in Division B Hereof Has or May Have Any Right, Title, or Interest.

List of above property, with full description, location, terms, amounts, and estimated market value of each item.

None.

96 & 497 Note Attached to Report by M. W. Stoehr to Alien Property Custodian.

Stoehr & Sons, Inc., is a New York Corporation and was organized on February 19, 1917, to take over and become the successor to Stoehr & Sons, a partnership, of No. 200 Fifth Avenue, Borough of Manhattan, City of New York, consisting of H. E. Stoehr, of New York City, M. W. Stoehr, of Passaic, New Jersey, Eduard Stoehr and Georg Stoehr, both of Leipzig, Germany. The capital stock of the Company was issued to the four partners in the same proportion as their interest in the partnership and the indebtedness of the partnership to Eduard Stoehr, Georg Stoehr and Stoehr & Company, a corporation of Leipzig, Germany (which is reported by Stoehr & Sons, Inc., in separate reports to the Alien Property Custodian) became the indebtedness of said Stoehr & Sons, Inc. the New York corporation, all indebtedness of the partnership having been assumed by said last mentioned corporation. All the directors and officers of said New York corporation are residents of the United States.

MAX W. STOEHR.

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DEFENDANTS' EXHIBIT R-1.

Defendants' Exhibit R-1 was upon the same form, A. P. C. Form 100, of the Alien Property Custodian as Defendants' Exhibit Q-1, but it dealt with the property held for Georg Stoehr of Leipzig, Ger-

many. And in place of the reference to voting trust certificate No. 1, as set forth in Exhibit Q-1, it contained the following:

"Voting Trust Certificate No. 3 for 222.21 shares of stock of Stoehr & Sons, Inc., a New York corporation, of 200 Fifth Avenue. The certificate is in my name and possession as trustee, but I have no beneficial interest in the same, but same belongs to said Georg Stoehr. Par value \$100 a share. As the stock is not in the market, cannot give market value but estimate its value at about \$350. per share."

Said report was sworn to by Max W. Stoehr, December 3, 1917, and was stamped in the office of the Alien Property Custodian as follows: "Alien Property Custodian. Received Dec. 5, 1917."

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DEFENDANTS' EXHIBIT S-1.

Executive Order Vesting Power and Authority in Designated Officers and Making Rules and Regulations under Trading with the Enemy Act and Title VII of the Act Approved June 15, 1917.

By virtue of the authority vested in me by "An act to define, regulate, and punish trading with the enemy and for other purposes," approved October 6, 1917, and by Title VII of the act approved June 15, 1917, entitled "An act to punish acts of interference with the foreign relations, the neutrality and the foreign commerce of the United States, to punish espionage and better to enforce the criminal laws of the United States and for other purposes" (hereinafter designated as the espionage act), I hereby make the following orders and rules and regulations:

503 & 504

Alien Property Custodian.

XXIX. I hereby vest in an alien-property custodian, to be hereafter appointed, the executive administration of all the provisions of section 7 (a), section 7 (c), and section 7 (d) of the trading with the enemy act, including all power and authority to require lists and reports, and to extend the time for filing the same, conferred upon the President by the provisions of said section 7 (a), and including the power and authority conferred upon the President by the provisions of said section 7 (c), to require the conveyance, transfer, assignment, delivery or payment to himself, at such time and in such manner as he shall prescribe, of any money or other properties owing to or belonging to or held for, by or on account of, or on behalf of, or for the benefit of any enemy or ally of an enemy, not holding a license granted under the provisions of the trading with the enemy act, which, after investigation, said alien-property custodian shall determine is so owing, or so belongs, or is so held.

XXX. Any person who desires to make conveyance, transfer,

payment, assignment or delivery, under the provisions of section 7 (d) of the trading with the enemy act, to the alien-property custodian of any money or other property owing to or held for, by or on account of, or on behalf of, or for the benefit of an enemy or ally of enemy, not holding a license granted as provided in the trading with the enemy act, or to whom any obligation or form of liability to such enemy or ally of enemy is presented for payment, shall file application with the alien-property custodian for consent and permit to so convey, transfer, assign, deliver or pay such money or other property to him, and said alien-property custodian is hereby authorized to exercise the power and authority conferred upon the President by the provisions of said section 7 (d) to consent and to issue permit upon such terms and conditions as are not inconsistent with law, or to withhold or refuse the same.

XXXI. I further vest in the alien-property custodian the executive administration of all the provisions of section 8 (a), section 8 (b), and section 9 of the trading with the enemy act, so far as said sections relate to the powers and duties of said alien-property custodian.

XXXII. I vest in the Attorney General all power and authority conferred upon the President by the provisions of section 9 of the trading with the enemy act.

XXXIII. The alien-property custodian, to be hereafter appointed, is hereby authorized to take all such measures as may be necessary or expedient, and not inconsistent with law, to administer the powers hereby conferred; and he shall further have the power and authority to make such rules and regulations not inconsistent with law as may be necessary and proper to carry out the provisions of said section 7 (a), section 7 (c), section 7 (d), section 8 (a), and section 8 (b), conferred upon the President by the provisions thereof and by the provisions of section 5 (a), said rules and regulations to be duly approved by the Attorney General.

● XXXIV. The alien-property custodian, to be hereafter appointed, shall, "under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe," have administration of all moneys (including checks and drafts payable on demand) and of all property, other than money which shall come into his possession in pursuance of the provisions of the trading with the enemy act, in accordance with the provisions of section 6, section 10, and section 12 thereof.

WOODROW WILSON.

The White House,
12 October, 1917.

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Executive Order.

[No. 2801.]

By virtue of the authority vested in me by an Act to define, regulate, and punish trading with the enemy, approved October 6, 1917, known as the Trading with the Enemy Act, I hereby make the following orders, rules and regulations:

1. Paragraph XXX of the Executive Order dated October 12, 1917, and made by me pursuant to said Act of Congress, is hereby revoked; and in place thereof it is hereby ordered:

XXX. Any person not an enemy, or ally of enemy, who owes to, or holds for or on account of, or on behalf of, or for the benefit of, an enemy or an ally of enemy, not holding a license granted by or in the exercise of the power and authority of the President under the provisions of said Trading with the Enemy Act any money or other property, or to whom any obligation or form of liability to such enemy, or ally of enemy, is presented for payment, may, having first obtained the consent of the Alien Property Custodian, pay, convey, transfer, assign, or deliver, to or upon the order of the Alien Property Custodian, said money or other property, with like effect as if such payment, conveyance, transfer, assignment or delivery were made in obedience to requirement pursuant to the provisions of Section 7, subsection (c), of said Trading with the Enemy Act.

2. Paragraph XXXI of said Executive Order dated October 12, 1917, is hereby revoked; and in place thereof it is hereby ordered:

XXXI. I hereby vest in the Alien Property Custodian the executive administration of all provisions of Section 8 (a) and Section 8 (b) of the Trading with the Enemy Act, including the power, authority and duty conferred or imposed upon the President by the provisions of said Section 8 (a), and the notice therein required to be given to the President shall be given to the Alien Property Custodian.

WOODROW WILSON.

The White House,
5 February, 1918.

Executive Order.

An Executive Order prescribing rules and regulations respecting the exercise of the powers and authority and the performance of the duties of the Alien Property Custodian under the "Trading with the Enemy Act" and prior Executive Orders pursuant thereto, and respecting the deposit and investment of moneys received by or for the account of the Alien Property Custodian.

By virtue of the authority vested in me by "An Act to define, regulate, and punish trading with the enemy, and for other purposes," approved October 6, 1917, known as the "Trading with the enemy Act," I hereby make the following orders, rules and regulations.

(1) Definitions.

(a) The word "person," as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic.

(b) The word "enemy," as used herein (including subsequent definitions) shall be deemed to mean either an "enemy" or "ally of enemy," as the case may be.

(c) The words "right," "title," "interest," "estate," "power," and "authority" of the enemy, as used herein, shall be deemed to mean respectively such right, title, interest, estate, power, and authority of the enemy as may actually exist and also such as might or would exist if the existing state of war had not occurred, and shall be deemed to include respectively the right, title, interest, estate, power and authority in law or equity or otherwise of any representative of or trustee for the enemy or other person claiming under or in the right of, or for the benefit of, the enemy.

(d) Any requirement made by the Alien Property custodian pursuant to Section 7, subsection "c" of the "Trading with the enemy Act" may be known as and called a demand and will be hereinafter referred to as a demand.

(2) Demands Pursuant to Section 7, Subsection "c."

(a) The Alien Property Custodian may make demand for the conveyance, transfer, assignment, delivery, and payment of any money or other property owing or belonging to or held for, by, on account of, or on behalf of or for the benefit of an enemy not holding a license granted by me or in the exercise of my power and authority, which the Alien Property Custodian after investigation, shall determine is so owing or so belongs or is so held, together with every right, title, interest, and estate of the enemy in and to such money or other property and every power and authority of the

enemy thereover, including (but without limiting the generality of the foregoing) the power and authority to affirm, ratify, approve, revoke, repudiate or disapprove, in whole or in part, and at any time or times, any power, agency, trust or other relation at the time existing, and also any act or omission theretofore done in the exercise of or pursuant to any power, agency, trust or other relation which the enemy could or might lawfully revoke, repudiate, disaffirm, ratify or approve, and also including (but without limiting the generality of the foregoing) the power and authority to
507 direct, supervise, and control the future exercise of any power, agency, trust or other relation over such money or other property to the extent that the enemy could or might lawfully direct, supervise, and control the same. Or the Alien Property Custodian may qualify or limit any such demand in such manner and to such extent as he may in any case see fit and (without limiting the generality of the power to qualify and limit demands) he may in any case demand all or only such power and authority over the money or other property as he may see fit without demanding any conveyance, transfer, assignment, delivery or payment of such money or other property or any other right, title, interest, or estate therein or thereto except such as may be included within the power and authority demanded in the particular case over such money or other property.

A demand for the conveyance, transfer, assignment, delivery and payment of money or other property unless expressly qualified or limited shall be deemed to include every right, title, interest, and estate of the enemy in and to the money or other property demanded as well as every power and authority of the enemy thereover.

(b) Notice of any demand made by the Alien Property Custodian may be given to any person who, alone or jointly with others, may hold or have the custody or control of or may be exercising any right, power, or authority in or over or may be performing any duty concerning the money or other property mentioned in the demand; and, in any notice given, the Alien Property Custodian may require of the person notified the performance of any act or thing within the power of the person notified which may be necessary or proper to make the demand fully effective, or to establish proper acknowledgment, recognition, or evidence of the right, title, interest, and estate of the Alien Property Custodian in and to such money or other property and of the power and authority of the Alien Property Custodian thereover, and it shall be the duty of any person so notified to perform any act or thing so required. Such notice may be given in person or by mail.

(c) When demand shall be made and notice thereof given, as hereinbefore provided, such demand and notice shall forthwith vest in the Alien Property Custodian such right, title, interest, and estate in and to and possession of the money or other property demanded and such power or authority thereover as may be included within the demand, and the Alien Property Custodian may there-

upon proceed to administer such money and other property in accordance with the provisions of the "Trading with the enemy Act" and with any orders, rules, or regulations heretofore, hereby, or hereafter made by me or heretofore or hereafter made by the Alien Property Custodian.

(3) Powers of Administration.

(a) The Alien Property Custodian may appoint and clothe with necessary power and authority such agents, bailees, and attorneys in fact as he may find to be necessary or proper to carry out the provisions of the "Trading with the enemy Act" and the Executive orders, rules, and regulations heretofore, hereby, or hereafter made, and prescribe the duties and fix the compensation of such agents, bailees, and attorneys in fact; and any depository designated by the Alien Property Custodian may be appointed as such agent, bailee or attorney in fact. And the Alien Property Custodian may require bonds of such agents, bailees and attorneys in fact and fix the penalty and conditions thereof.

(b) The Alien Property Custodian may pay all reasonable and proper expenses which may be incurred in or about securing possession or control of money or other property and in or about
508 collecting dividends interest and other income therefrom, and in otherwise protecting and administering the same. So far as may be, all such expenses shall be paid out of, and in any event recorded as a charge against, the estate to which such money or other property belongs.

(c) The Alien Property Custodian may authorize depositories designated by him and agents, bailees, and attorneys in fact appointed by him to deduct all expenses authorized or approved by the Alien Property Custodian, including the compensation of such depositories, agents, bailees, and attorneys in fact, from any moneys collected by them and the payment by them to the Alien Property Custodian or into the Treasury of the United States of the net amount remaining in their hands.

(d) The Alien Property Custodian may exercise any right, power, or authority of the enemy in, to and over corporate stock, shares or certificates representing beneficial interests owing or belonging to or held for, by, on account of, or on behalf of or for the benefit of an enemy, including (1) the right to receive all notices issued by the corporation, unincorporated association, company or trustee which issued such stock, shares or certificates, to the holders or owners of similar stock, shares or certificates, (2) the right to exercise all voting power appertaining to such stock, shares or certificates, and (3) the right to receive all subscription rights, dividends and other distributions and payments, whether of capital or income, declared or made on account of such stock, shares or certificates, regardless of whether or not such stock, shares or certificates be in the possession of the Alien Property Custodian and regardless of whether or not such stock,

shares or certificates have been transferred to the Alien Property Custodian upon the books of the corporation, association, company or trustee issuing the same.

The Alien Property Custodian may nominate persons who may, when duly elected or appointed, serve as directors, officers or employees of any corporation whose corporate stock or shares, in whole or in part, are owing or belonging to, or are held for, by, on account of, or on behalf of or for the benefit of an enemy.

The Alien Property Custodian may demand the transfer of corporate stock, shares or certificates representing beneficial interests to be made upon the books of any corporation, unincorporated association, company or trustee, issuing the same, into the name of the Alien Property Custodian or into the name of any depository designated by the Alien Property Custodian for the account of the Alien Property Custodian, or, in the case of corporate stock or shares, into the name of any other person for the purpose of qualifying such person to serve as a director of the corporation issuing such corporate stock or shares; and it shall be the duty of any corporation, unincorporated association, company, or trustee to comply with such demand when accompanied by the presentation of the certificates which represent such corporate stock, shares or beneficial interests. Provided that corporate stock or shares transferred into the name of any other person than the Alien Property Custodian or a designated depository shall be indorsed by such person in blank and delivered to and held by the Alien Property Custodian or by a duly designated depository.

(e) In respect of moneys, accounts payable, credits, notes or other obligations owing or belonging to or held for, by, on account of, or on behalf of or for the benefit of an enemy, whether the payment or delivery or the mere transfer and assignment thereof be demanded, the Alien Property Custodian may exercise discretion in enforcing payment, granting indulgence, making extension or accepting security, and in exercising any other right, power or authority of the enemy.

(f) The Alien Property Custodian may sell and deliver any commodity or other tangible property which may be perishable or which may in the preservation thereof involve expense. And the Alien

Property Custodian may sell and deliver any rights appurtenant to the ownership of corporate stock, shares or certificates of beneficial interests in cases where such rights would lapse unless exercised within a limited time. The Alien Property Custodian may manage, conduct, and operate any business belonging to or held for, by, on account of, or on behalf of or for the benefit of an enemy in cases where the continuation of such business may seem to be necessary to prevent waste or to protect such business. And the Alien Property Custodian may sell or otherwise dispose of such business or any part thereof, or the assets or any part thereof, whenever such sale shall seem to be necessary to prevent waste or to protect such business. And in the management, operation, conduct,

sale or other disposition of such business the Alien Property Custodian may exercise every right, power and authority of the enemy.

(g) In cases of liquidation of an estate belonging to a partnership, association or unincorporated company in which an enemy may have an interest, the Alien Property Custodian may exercise every right, power, and authority of the enemy, including the right, power, and authority to sell the interest of the enemy in the event such sale seems necessary to prevent waste or to protect such interest.

(h) All sales made by the Alien Property Custodian may be conducted privately or publicly, with or without advertisement, and on such terms and conditions as to the Alien Property Custodian may seem proper.

In all cases of sales made by the Alien Property Custodian, all reasonable expenses incurred in and about such sales shall be deducted from the proceeds and the net amount remaining paid into the Treasury of the United States.

(i) The Alien Property Custodian is authorized to exercise any power conferred upon him by any license issued by me or in the exercise of the power and authority conferred upon me under the "Trading with the enemy Act" wherever such license involves any act or thing concerning any money or other property owing or belonging to or held for, by, on account of, or on behalf of or for the benefit of an enemy.

(4) Statutory Powers of the Alien Property Custodian.

Nothing herein contained is intended, nor shall anything herein contained be construed, to limit the powers conferred upon the Alien Property Custodian by the "Trading with the enemy Act."

(5) Deposit and Investment of Moneys Received by the Alien Property Custodian.

There shall be deposited in the Treasury of the United States, through the office of the Secretary of the Treasury—

(a) Any and all moneys (including checks and drafts payable on demand) paid to or received by the Alien Property Custodian pursuant to the "Trading with the enemy Act";

(b) Any and all moneys (including checks and drafts payable on demand) collected or received by the Alien Property Custodian, as dividends or interest or income that may become due upon any stocks, bonds, notes, time drafts, time bills of exchange, or other securities or property held by the Alien Property Custodian or by any depositary or depositaries designated as provided in said Act for the account of the Alien Property Custodian.

(c) Any and all moneys collected as the proceeds of any and all maturing obligations held by the Alien Property Custodian or by any such depositary or depositaries for the account of the Alien Property Custodian; and

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(d) Any and all moneys paid to or received by the Alien Property Custodian as the proceeds of any sale or sales, made at any time pursuant to such rules and regulations as the President shall prescribe, of any and all property or rights which shall come into the possession of the Alien Property Custodian in pursuance of the provisions of said Act;

Provided, however, that the Alien Property Custodian may fix stated periods, not longer than quarter-yearly, for accounting by depositaries, agents, bailees, and attorneys in fact of all moneys received by them, and for the payment thereof by such depositaries, agents, bailees, and attorneys in fact to the Alien Property Custodian, who shall forthwith pay the same into the Treasury of the United States, as provided above, and that checks and drafts payable on demand received by designated depositaries in payment of dividends, interest and income from property held by or for the account of the Alien Property Custodian may be collected by such depositaries for the account of the Alien Property Custodian, but that all other checks and drafts payable on demand shall be forthwith deposited by the Alien Property Custodian in the Treasury of the United States, as provided above.

Any and all moneys so deposited in the Treasury of the United States, as herein provided, as well as all moneys, if any, which may be paid to the Treasurer of the United States, as provided in Section 12 of said Act, and all interest, dividends or other income, if any, in respect of any property conveyed, transferred, assigned or delivered to the Treasurer of the United States, as provided in said Section 12, shall be credited by the Treasurer of the United States to the Secretary of the Treasury "for account of the Alien Property Custodian."

Any and all moneys so deposited in the Treasury of the United States, as herein provided, together with any interest or income received from the investment thereof, shall be subject to withdrawal by the Secretary of the Treasury for the purpose of making any payment or payments pursuant to the provisions of said Act, and, until so withdrawn, may be invested and reinvested, from time to time, by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness. The bonds and certificates of indebtedness, in which such moneys shall be so invested, shall be held by the Secretary of the Treasury for account of the Alien Property Custodian, subject to the provisions hereof and of said Act and to such further orders, rules or regulations as may, from time to time, be prescribed by me.

(6) Amendments and Modifications of Prior Executive Orders.

All other Executive orders heretofore made are hereby amended and modified to such extent as may be necessary to conform with the provisions hereof.

WOODROW WILSON.

The White House,
26 February, 1918.

An Executive Order Prescribing Additional Rules and Regulations and Making Certain Determinations Respecting the Exercise of the Powers and Authority and the Performance of the Duties of the Alien Property Custodian.

By virtue of the authority vested in me by "An Act to define, regulate, and punish trading with the enemy, and for other purposes," approved October 6, 1917, known as the "Trading With the Enemy Act," as amended by "An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and prior fiscal years, on account of war expenses and for other purposes," approved March 28, 1918, I hereby make the following orders, rules and regulations, and determinations.

Definitions.

1. The word "person," as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic.

2. The word "enemy," as used herein, shall be deemed to mean either an "enemy" or "ally of enemy," as the case may be.

Powers of Management and Administration, Including Sale or Other Disposition.

The Alien Property Custodian shall have power, and he is authorized and directed, to hold, manage, administer, protect, preserve, control and sell or otherwise dispose of, in accordance with the following rules and regulations, any and all property other than money which has been or shall be conveyed, transferred, assigned, delivered, and/or paid over to him pursuant to the provisions of the Trading With the Enemy Act as amended and the Executive proclamations and orders issued pursuant thereto, or which has been or shall be required so to be conveyed, transferred, assigned, delivered and/or paid over to him.

1. The Alien Property Custodian shall have the power and authority to do any and all things reasonable and proper in or about the custody, management, administration, protection, preservation and control of any such property according to the nature and character of the property and the attendant circumstances, including (but without limiting the generality of the foregoing) the power and authority to collect all bills, notes, accounts, dividends, interest, rents, royalties, annuities and other receivables, and income and profits and accumulations and distributions of principal or income; to pay all rents, royalties, interest and other accounts and liens or charges; to make repairs, additions and alterations to property, whether real or

personal; to rent, lease or otherwise grant the use or right to use or occupy property of any kind; to insure property against loss, and to cancel or surrender insurance policies and collect return premiums and surrender values, and to do any other act or thing with respect to insurance or insurance policies; to grant by lease, license or otherwise, the right to use or other rights under or in respect of patents, copyrights, trade marks, trade secrets and other similar rights; to vote in person or by proxy shares of stock or other beneficial interest in corporations, unincorporated associations, companies or trusts upon any questions at all times and upon all matters upon which any owner of such stock or other beneficial interest shall have the right to vote, including the power and authority to vote for or against and to take part in any sale, dissolution, consolidation, amalgamation or reorganization of any sort, of any such corporation, unincorporated association, company or trust, or of its assets of any part thereof, and to exercise any rights or privileges that may be or become appurtenant to the ownership of such stock or other beneficial interest with like force and effect and under like circumstances in all respects as though the absolute owner thereof; to give any notices and file any papers or writings of any kind, proper or necessary for the creation, perfection, protection, liquidation or otherwise in respect of any claims, demands, choses-in-action or other rights of any kind, and to settle, compromise and adjust claims, demands and choses-in-action; to intervene in any suit or proceeding and to file and maintain claims, demands and suits of all kinds in or before, any court, board, commission or other body; to determine and pay all reasonable and proper expenses incurred in or about or with respect of the exercise of any of the powers and authority vested in the Alien Property Custodian or any depository for him, including expenses that may be incurred in or about securing possession, custody or control of any such property, and including also taxes and other charges heretofore or hereafter lawfully assessed upon or against such property by any body politic; provided that this shall not be construed to require the payment of any stamp or other taxes upon or on account of conveyance, transfer, assignment or delivery of property to the Alien Property Custodian or to any agent, attorney, bailee, nominee or depository for him; and provided further that this shall not in any way affect the power of the Commissioner of Internal Revenue or any regulations made by him or under his authority.

2. Whenever any such money or other property or any part or parcel thereof is or shall be subject to any claim of lien, charge or incumbrance, or is or shall be held or retained adversely to the Alien Property Custodian or to any requirement with respect to such money or other property made by him, the Alien Property Custodian may compromise or settle such controversy and pay any such claim in any way that he shall decide to be proper and as though he were the absolute owner of the money or other property involved; and he shall have the power and authority to make any payment or pay-

ments necessary and to execute and deliver any instruments or writings necessary and proper to effect or evidence the same.

3. Whenever any such property or any part or parcel thereof shall be used or employed in the conduct or other operation of a mine, plant, factory, railroad or other transportation facility, warehouse, mercantile or trading establishment or any sort of a going business or undertaking, the Alien Property Custodian, in addition to the rights, powers and authority elsewhere herein conferred upon him, in respect of the property so used or employed, may continue the conduct or other operation of such business or undertaking; and for such purpose he shall have the right, power and authority to employ and discharge agents, attorneys, servants and other employees; to buy and sell supplies, materials and commodities required or necessary for the conduct of such business, or dealt in or handled thereby, or mined, produced, manufactured or created by it; to take out insurance; to require money owing by banks, trust companies or other depositaries on special or general deposit to be paid to him or upon his order; to collect debts and other receivables owing to the said business or undertaking or to the former enemy owner or owners thereof and created out of or by the operation of such business or undertaking, and also debts, accounts and other receivables accruing or arising out of the conduct or other operation of such business or undertaking, by the Alien Property Custodian or under his direction or authority; to pay the wages and salaries of agents, attorneys, servants and other employees, and rents, royalties, and other current accounts and liabilities; to intervene in any suit or action pending in any court or before any board, commission or other body, in which such business or undertaking or any of the property or assets thereof shall be involved or concerned and to prosecute or defend, as the case may be; to file, prosecute and maintain in the name of the Alien Property Custodian or otherwise as may be proper, any claim or suit arising out of or based upon transactions had prior or subsequent to the time when such property was conveyed, transferred, assigned, delivered and/or paid over to the Alien Property Custodian or was required so to be, but growing out of the conduct or operation of such business or undertaking or any other use, custody, control or management of any property or assets thereof; and generally to manage, administer, preserve, conduct, operate and control such business or undertaking and any or all parts or parcels and assets thereof as though the absolute owner, either in the name of the Alien Property Custodian or otherwise as he shall determine.

4. The Alien Property Custodian may appoint agents, attorneys, bailees, depositaries and/or managers who, under his direction and control and within the limits of the authority conferred by him, shall be authorized and directed to hold, manage, administer, protect, preserve and otherwise control property conveyed, transferred, assigned, delivered or paid over to him or required so to be, or any part or parcel thereof; and they may be authorized and directed to continue the conduct or other operation of any going business or

other undertaking which the Alien Property Custodian himself, as provided elsewhere herein, could continue. Such agents, attorneys, bailees, depositaries and managers shall have and exercise the rights, powers and authority which shall be from time to time conferred upon him or them by the Alien Property Custodian; and such rights, powers and authority may be enlarged, restricted or revoked by the Alien Property Custodian at any time and without giving any notice or reason therefor; and the remuneration of all such agents, attorneys, bailees, depositaries and managers shall be fixed by the Alien Property Custodian and may be increased or reduced at any time.

5. The Alien Property Custodian shall have full power and discretion with respect to property to be sold, and may sell any property or properties as an entirety or in such groups or parcels and at such time or times as he shall determine, and without reference to the previous enemy or ally of enemy ownership thereof. Whenever any such property shall be used or employed in the conduct or other operation of any mine, plant, factory, railroad or other transportation facility, mercantile establishment or any sort of going business or undertaking, the Alien Property Custodian may sell such property as a going business or undertaking and may include not only the tangible property but any and all patents, trade marks, trade names, good will and other intangible rights and assets; and any number of such going businesses or undertakings may be sold together as above specified.

6. Whereas said Trading With the Enemy Act as amended provides that "any property sold, except when sold to the United States, shall be sold only to American citizens at public sale to the highest bidder, after public advertisement of the time and place of sale, which shall be where the property or a major portion thereof is situated, unless the President, stating the reasons therefore in the public interest, shall otherwise determine,"

Now therefore I do thus determine otherwise as follows:

(a) Shares of stock or other beneficial interest in a corporation, unincorporated association, company or trust, and claims, receivables and intangibles of all kinds may be advertised and sold whenever the Alien Property Custodian shall determine; and it shall be immaterial whether such shares of stock or other beneficial
514 interest and such claims, receivables and intangibles be represented or evidenced by certificates or instruments or writings of any kind, and whether the Alien Property Custodian shall or shall not have possession or control thereof in the event that the same shall be thus represented or evidenced.

(b) Any corporation incorporated within and under the authority of the laws of any state or territory of the United States or of any of its insular possessions shall be allowed to bid at any sale of any such property, but the Alien Property Custodian shall have the right to exclude from bidding at any such sale and / or from purchasing or otherwise acquiring property from him directly or in-

directly, any corporation which he shall after investigation determine to be controlled, managed or operated wholly or mainly by or for the account or benefit of a person or persons not a citizen or citizens of the United States or of its insular possessions.

(c) The Alien Property Custodian, upon order of the President stating the reasons therefor, shall have the right to reject all bids for any property thus sold and to resell such property at public sale or otherwise as the President may direct; but the Alien Property Custodian may at or before any sale, by public announcement or by publication, fix a period after the expiration of which the right thus to reject all bids and to resell such property will not be exercised.

My reasons for the foregoing determinations in the public interest are:

(a) That such sales may be made at the place of favorable demand and under the best circumstances to secure the market price therefor.

(b) That bidders able to purchase and pay for the properties to be sold may be secured.

(c) That the powers of sale given to the Alien Property Custodian may be effectively exercised by him.

7. Any property sold by the Alien Property Custodian either at public or private sale may be sold for cash or upon credit; and in the latter event such security for the payment of that portion of the purchase price remaining unpaid may be taken as he shall deem proper in the premises. He shall be authorized to set a minimum or upset price upon any property offered for sale by him; to fix and prescribe the terms and conditions upon which bids will be received; to determine generally and specially qualifications to be met by persons offering to bid; to require deposits from prospective bidders; to determine generally or specially the nature and extent of information concerning any property or properties offered or to be offered for sale which shall be given prospective bidders, and the inspection thereof which shall be allowed; to have made auditor's reports and appraisals of property or properties offered or to be offered for sale; and to make and establish general and special terms and conditions to govern any and all sales to be made by him. Any property or properties thus sold may be sold subject to or free from any or all debts, claims, obligations and liabilities of all kinds created or arising out of or in respect of, any such property or properties or the conduct or other operation of any such business or other undertaking by the Alien Property Custodian or otherwise; and subject to or free from liens, charges or incumbrances; and payment of such debts, claims, obligations, liabilities and liens, charges and incumbrances, and of all expenses of such sale or sales may be made out of the proceeds from such sale or sales, or may be required to be made or assumed by the purchaser, as the Alien Property Custodian shall determine.

8. All costs and expenses incurred by reason of or in respect of, and all claims and demands of every kind, character and description based upon or arising out of, the custody, management, administration, protection, perservation and control of any such property and the conduct or other operation of any such going
515 business or other undertaking and the sale or other disposition of any such property, shall be limited to and paid or satisfied out of only the property or business or undertaking involved and out of which, on account of which, or in respect of which such cost, expenses, claim or demand shall have been incurred and shall have arisen or been created; provided that whenever such property or the income therefrom or the assets of any such going business or other undertaking shall be insufficient therefor, such cost, expenses, claim or demand shall be charged thereto, but may be paid or satisfied out of money or other property received from, or as the property of, the same enemy. Neither the Alien Property Custodian nor any agent, attorney, bailee, manager or depositary appointed by him shall be liable personally to any one for or on account of anything done or omitted in respect of, or for any debt or other obligation of any kind or character owing, created or growing out of or in any other way arising from, any such property or the custody, management, administration, protection, perservation, control and / or sale or other disposition thereof, and / or from the conduct or other operation of any going business or undertaking; except in the event of intentional injury or fraudulent misconduct by the person attempted to be charged with liability.

9. The Alien Property Custodian and agents, attorneys, bailees, managers and depositaries for him, within the limits of the authority granted by him, shall have power and authority to do any and all things reasonable or proper in or about or in respect of the exercise of any of the powers and authority specifically granted above; and in addition are authorized and directed hereby to manage all such property and to do any act or things in respect thereof or make any disposition thereof or any part thereof by sale or otherwise and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof, in like manner as though the Alien Property Custodian were the absolute owner thereof, subject to no limitations or restrictions other than those specifically set forth herein or in said "Trading With the Enemy Act," as amended or any prior Executive orders issued pursuant thereto not in conflict herewith.

Power to Issue Requirements Not Inconsistent with Licenses Granted
under the Authority of the President.

1. Whenever the Alien Property Custodian shall after investigation determine that any money or other property, including any going business or other undertaking, which is being held, managed, used or employed under a license granted by the President, or in

the exercise of the power and authority conferred upon the President by said Trading With the Enemy Act as amended, is owing or belonging to or held for, by, on account of, on behalf of, or for the benefit of an enemy or ally of enemy, and such license provides as one of its terms or conditions that such property shall, upon demand or requirement of the Alien Property Custodian, be conveyed, transferred, assigned, delivered, and / or paid over to him, the Alien Property Custodian may, without the revocation of such license, require that said money or other property or any part or parcel thereof be conveyed, transferred, assigned, delivered or paid over to him; subject, however, to the continued exercise of such license, but under his supervision or under such other supervision as he may prescribe, and for such period of time or until the happening of such event as he shall prescribe. Whenever such money or property or any part thereof, at the time such requirement is made, shall be used or employed in or about the conduct or management of any mine, plant, factory, railroad or other transportation facility, warehouse, mercantile or trading establishment or any sort of a going business or undertaking, the Alien Property

516 & 517 Custodian may require that such money or other property and / or the proceeds from the conduct or management of such business be conveyed, transferred, assigned, delivered or paid over to him, subject to the continued exercise of such license and the continued conduct or management of such business or other undertaking as above provided; and he may leave all or such part of the money or other property of such business or other undertaking in the possession of the licensee or the agent or representative of the licensee to be used, disposed of, and accounted for, in the continued exercise of such license. Any requirement made by the Alien Property Custodian pursuant to the provisions hereof shall be subject to modification or change by him at any time prior to the final compliance therewith. Any of such property other than money, including any such going business or undertaking, may be advertised and sold by the Alien Property Custodian, subject to the exercise of any such license, but for the account of the Alien Property Custodian or for the account of the purchaser as the Alien Property Custodian may determine; and until the purchaser of such property shall be placed in the possession thereof or during such other period as the Alien Property Custodian may determine.

Effect upon the Satutory Powers of the Alien Property Custodian and upon Prior Executive Orders.

1. Nothing herein contained shall limit or shall be construed to limit, in any way the rights, powers and authority conferred upon the Alien Property Custodian by the "Trading With the Enemy Act" and the amendments thereto and the Executive orders heretofore issued pursuant thereto.

2. All Executive orders heretofore made are amended and modified hereby to such an extent as may be necessary to conform with

the provisions hereof; but with this exceptions, an of such orders in force and effect at the time this order is issued are expressly ratified and continued in full force and effect.

WOODROW WILSON.

The White House,
16 July, 1918.

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DEFENDANTS' EXHIBIT T-1.

Know all men by these presents That I, ———, of ———, do hereby constitute and appoint, Mr. Hans E. Stoechr my Attorney and Agent for me and in my name, place and stead, to vote as my proxy at the election of Directors of the Botany Worsted Mills at the annual Meeting of Stockholders to be held on Tuesday, March —, 191—, at 12 O'clock noon, or at any adjournment thereof, according to the number of Votes I should be entitled to cast if then personally present, and to represent me generally at such Meeting.

In witness whereof, I have hereunto set my hand and seal this 2nd day of March One Thousand Nine Hundred and fourteen.

KAMMGARNSPINNEREI STÖHR & CO.,

Aktien-Gesellschaft.

KUNTZ HARZ, *p. p.*

Signed, sealed and delivered in the presence of:

RICH. LICHETRAUS. (?)

519 The foregoing was all the evidence offered and received by the Court in the above-entitled action. The foregoing statement of the proceedings and of all the evidence in the above-entitled action is in all respects correct and is hereby approved.

Done in open Court, this 10th day of September, 1920.

(Signed)

LEARNED HAND,
*United States District Judge,
Southern District of New York.*

It is hereby stipulated and agreed that the foregoing transcript of the proceedings and evidence given upon the trial of this action is in all respects correct and that the same may be settled and signed by the Trial Judge.

Dated, New York, Sept. 9, 1920.

VALENTINE TAYLOR,

Solicitor for Plaintiff.

JOHN QUINN,

Solicitor for Defendants Stöhr & Sons, Inc., and for Defendant Directors of Stöhr & Sons, Inc., and for Defendant Botany Worsted Mills and Deft. Directors of Botany Worsted Mills.

FRANCIS G. CAFFEY,

Solicitor for Defendant Francis P. Garvan, Individually and as Alien Property Custodian, and for Defendant A. Mitchell Palmer.

[Endorsed:] E 15-327.

520 United States District Court, Southern District of New York.

MAX W. STÖHR, etc.,

against

JAMES N. WALLACE et al.

Opinion, Learned Hand, D. J.

U. S. District Court, S. D. of N. Y. Filed Apr. 21, 1920.

521 United States District Court, Southern District of New York.

MAX W. STÖHR, Suing in His Own Behalf as a Stockholder in Stöhr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE et al., Defendants.

Final hearing upon a bill in equity filed by the plaintiff, suing in his own behalf as a shareholder of Stöhr & Sons, Inc., and in behalf of all others similarly situated, against the Alien Property Custodian, the corporation and directors of Stöhr & Sons, Inc., and the corporation and directors of Botany Worsted Mills. Answers were filed by all the defendants and the cause came on for hearing before the District Court. Testimony was taken and arguments heard and the case submitted for final decree.

The bill alleges that the plaintiff is a shareholder of a New York

corporation, Stöhr & Sons, Inc., and a naturalized citizen of the United States, residing in the County of New York. That on the seventeenth of February, 1917, and from then continuously until the present time, he was the owner of forty-four shares of capital stock of Stöhr & Sons, Inc., which on the twentieth-day of February, 1917, became the owner of 14,900 shares of the capital stock of the defendant Botany Worsted Mills, a New Jersey corporation. That on February nineteenth, 1917, Stöhr & Sons, Inc., became and has since been the owner of 5,690 other shares of the Botany Worsted Mills (property which has now been eliminated from the suit). That all these shares were seized by the Alien Property Custodian on the twentieth day of March, 1918, as enemy owned, and that pursuant to said seizure the Custodian caused to be elected the individual defendants as directors of the two corporations mentioned, and ordered the directors of the Botany Worsted Mills to issue to him as Alien Property Custodian all the shares of stock so seized. That he has assumed control and possession of the properties of such corporations and that the defendant directors have refused to recognize the rights of those who were former officers of said corporation, when the Custodian took charge. That the Custodian has in the daily newspapers of New York advertised these shares of stock for sale, although it was not necessary and never has been necessary to sell them, as both corporations are solvent and have large assets. That such sale would be in violation of the Trading with the Enemy Act and the Constitution of the United States as without due process of law and without any notice or opportunity given to Stöhr & Sons, Inc., to be heard in any judicial proceedings looking to the condemnation or sale of such shares. In especial that the Custodian has announced that he will exclude at such bidding any person who is not a citizen of the United States under Section Twelve of the act, which is unconstitutional. That he will allow no inspection of the plant except to those who have deposited a certified cheque of twenty-five thousand dollars; that the terms and conditions of sale are unreasonable and onerous, and that the sale of so large a quantity of the stock will necessarily result in a low price, especially as the sale will be conducted so as to exclude a number of prospective bidders and result in undue sacrifice of the property sold. That Stöhr & Sons, Inc., is a domestic corporation and not an alien enemy and that the sale would therefore be in excess of the powers of the Custodian. That on November twenty-third, 1918, nine days before the bill was filed, the plaintiff under Section Nine of the Trading with the Enemy Act filed a notice of claim with the Alien Property Custodian, demanding that the sale should not be made, which was disregarded. That the present directors of Stöhr & Sons, Inc., and the Botany Worsted Mills are creatures of the Alien Property Custodian, elected to carry out his interests, and that it would be useless to make a demand upon them to institute this suit.

The bill prays that the cloud on the shares of stock resulting from the capture be removed, that the capture be declared illegal and unconstitutional, and that the Custodian be enjoined from selling

the shares. A copy of the contract through which Stöhr & Sons, Inc., acquired the shares of stock, is annexed to the bill.

Upon the hearing the following facts in substance developed. Before February fifteenth, 1917, there existed in the City of New York a partnership under the firm name of Stöhr & Sons doing business as woolen merchants. The partners were Eduard Stöhr, the father, and his three sons, Hans E., Georg and Max W. Their interest in the partnership was as follows:

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Eduard	\$420,000
Hans E.	80,000
Georg	50,000
Max W.	10,000

amounting in percentages to approximately seventy-five per cent., fourteen per cent., nine per cent. and two per cent. Eduard and Georg were German subjects, living in Leipzig; Hans E. was a German subject, living in New York, who had formally declared his intention of becoming a citizen; Max W. was a native German, but had become naturalized in 1910, and lived in New York. On February fifteenth Max W. Stöhr, Georg Röhlrig and Alfred de Liagre (relatives of the Stöhrs) executed a certificate of incorporation under the laws of New York, of Stöhr & Sons, Inc., with a share capital of \$250,000, and on February seventeenth the necessary formalities of incorporation were completed. The directors named were Hans E. and Max W. Stöhr, Röhlrig and de Liagre, and they were also the officers. On February nineteenth the assets of the partnership, amounting to more than one million dollars in value, were transferred to the corporation in exchange for the shares of stock, all of which were issued to Max W. Stöhr with the exception of three hundred and fifty-seven shares, issued to Hans E. At the same time these shares were transferred to Hans E. and Max W. Stöhr and Georg Röhlrig as "voting trustees" for five years under the laws of New York, and "voting trust certificates" were issued in the same proportion as the original issue of shares, that is to say, Max W. held all the "certificates" except three hundred and fifty-seven shares, which went to Hans. However, of those which Max

524 received, he held eighteen hundred and seventy-five in trust for Eduard Stöhr, and two hundred and twenty-three in trust for Georg Stöhr.

Kammgarntspinnerei Stöhr & Co. Actiengesellschaft was a German corporation doing a woolen business in the City of Leipzig, Germany, and organized by Eduard Stöhr in 1880. It had a share capital of twelve million marks, of which the ownership does not definitely appear. Hans owned something over a million, Georg between one and a half and two million; Max six hundred thousand and Eduard more than any of them, but the total is not given. There were many other shareholders, as the shares were listed on the Berlin Boerse and had been generally distributed to an extent

not disclosed. On last information, Eduard Stöhr was President of the Aufsichtsrat, corresponding generally to the board of directors of an American corporation; Hans E. was a member of that body, and Georg was a managing "director," i. e., one of the two Procuristen.

This corporation for long had held 14,900 shares in the Botany Worsted Mills, one of the largest and best equipped mills in the United States, doing a profitable business at Passaic, New Jersey, in the manufacture of yarns and woollens. In 1915 ten thousand of these shares were transferred on the books of the company to Hans E. Stöhr and four thousand nine hundred shares to Max W. Stöhr, each as trustee for the Leipzig company, and so they remained until the twentieth of February, 1917. On that day Hans E. Stöhr, in New York, assuming to act for the Leipzig corporation, made a contract with Stöhr & Sons, Inc., through Röhlig, its vice-president, a copy of which follows:

"Agreement made at Passaic in the State of New Jersey, on the 20th day of February, 1917, between Kammingarn-spinnerei Stöhr & Co., Aktiengesellschaft of Plagwitz-Leipzig, Germany, hereinafter called the 'Leipzig Company,' party of the first part, and Stöhr & Sons, Inc., hereinafter called the 'New York Company,' party of the second part, witnesseth:

Whereas, the Leipzig Company is beneficially interested in Fourteen thousand nine hundred (14,900) shares of the capital stock of the Botany Worsted Mills, a New Jersey corporation, which said shares of stock are now standing in the name of Hans E. Stöhr and Max W. Stöhr and are represented by the following certificates, each certificate being for Five (5) shares of said stock:

* * * * *

and

Whereas, the Leipzig Company is desirous of selling and said New York Company is desirous of purchasing said interest on the terms and conditions hereinafter set forth,

Now, therefore, in consideration of the premises and of Five thousand (\$5,000) Dollars paid by the New York Company to the Leipzig Company on account of the purchase price, the receipt whereof is hereby acknowledged, and in further consideration of the mutual promises of the parties as herein set forth, it is hereby agreed as follows:

First. The Leipzig Company hereby sells, assigns and transfers unto the New York Company all of its interest in said shares and said shares of stock shall be forthwith transferred upon the books of the Botany Worsted Mills and placed in the name of the said New York Company.

526 Second. The terms of the sale and the purchase price for said shares shall be determined as follows and paid in the following installments:

(a) The purchase price shall be determined by and shall be equal to the book value of said shares as shown by the books of the Botany Worsted Mills. The price shall be payable in five (5) installments, the first installment being payable one year from date and the subsequent installments respectively in two, three, four and five years from date. From the last or fifth installment the sum of \$5,000 paid on account as hereinbefore recited with interest at six per cent. from date shall be deducted.

(b) The first annual installment shall be based upon and shall be equal to the book value of said shares, as shown by the books of the Botany Worsted Mills according to the last previous closing of its books on November 30, 1917; and the four subsequent annual installments shall be similarly based upon and shall be equal to the book value of the shares as shown by the last previous closing of the books of the Botany Worsted Mills on the thirtieth of November preceding the falling due of each of said annual installments.

(c) In arriving at the amount of each installment for each of said years the net worth of the hard assets of the Botany Worsted Mills after deducting the total liabilities shall be taken as the basis for the computation of the value per share and no allowance or increase shall be made on such installment for good will.

(d) In addition to the book value of said shares there shall
527 be taken into consideration and account the amount of the dividends received by the New York Company during the said five years from date in the following manner:

During the first year the amount of the entire dividends received by the New York Company on the said shares shall be added to the purchase price and shall be paid with the first installment; during the second year four-fifths of the entire dividends received on said shares of stock by the New York Company, during the third year three-fifths of said dividends, during the fourth year two-fifths of said dividends and during the fifth year one-fifth of said dividends so received on said shares shall be added to the annual installments of the purchase price and shall become part of said purchase price and shall be payable with each of said installments at the end of each of said respective years.

Third. That the certificates of stock for said Fourteen thousand nine hundred shares sold and transferred as hereinbefore provided shall be placed in the possession of the Leipzig Company as collateral security for the amount of the purchase price; but as each annual installment with said additions provided for in paragraph Second, Subdivision d, is paid the New York Company shall have the right to require the redelivery of, and the Leipzig Company will contemporaneously with the payment of each installment redeliver to the New York Company, one-fifth (1/5th) of said shares and thereupon the Leipzig Company shall continue to retain the remaining shares as collateral security for the balance of the purchase price still payable.

528 Fourth. The New York Company shall have the right at any time to require the deposit of the entire shares of stock or any balance thereof remaining in the hands of the Leipzig Company, with a bank or trust company to be selected by the Leipzig Company, such deposit to be made with such bank or trust company in escrow, to be held until the purchase price or the balance remaining unpaid shall have been fully paid or (in case of non-payment of any installment) until the Leipzig Company shall be entitled to said stock under the provisions of paragraph Fifth of this agreement.

Fifth. In the event that any of the said annual installments with said additions provided for in paragraph Second, subdivision d hereof, shall not be paid when due, then the Leipzig Company shall notify the New York Company in writing that it requires the payment of the installment then due together with the said additions and in the event that the New York Company shall not within sixty (60) days after said demand pay the said installment with the additions, then the said shares of stock or any remaining balance of said stock shall be forthwith retransferred to the said Leipzig Company on the books of the Botany Worsted Mills and all rights on the part of the New York Company to said stock or any such balance shall cease and the Leipzig Company shall retain the Five thousand (\$5,000) dollars, paid on account as hereinbefore recited, in full settlement of any claim against the New York Company and thereupon neither of said companies shall have any further claim against the other arising under or by reason of this agreement; it being understood that the non-payment of any subsequent installment shall not affect the portion or portions of the stock which may have been fully paid for by a previous installment or installments."

At that time Hans E. Stöhr was himself president of Stöhr & Sons, Inc., a director and shareholder as above set forth. On the same day, through the direction of Hans E. Stöhr, a transfer was recorded upon the books of the Botany Worsted Mills of all these shares from the name of Hans E. Stöhr and Max W. Stöhr, as trustees, to the name of Stöhr & Sons, Inc. The certificates themselves remained in Leipzig and have never been returned to this country, and in such case the by-laws of the Botany Worsted Mills provided that in order to be transferred notice must be sent from a local official in Leipzig that the transfer had there been made upon the certificates. No such notice was in fact received or has been received from that day to this. The transfer was therefore not in accordance with the by-laws of the Botany Worsted Mills. The Botany Worsted Mills had itself been founded by Eduard Stöhr in 1889. It had a capital stock of \$3,600,000 divided into 3,600 shares and at the time of the execution of the contract, Eduard, Georg, Hans and Max Stöhr were all directors, and Hans as treasurer was very active in its management, although one Thomas Prehn was its president.

On October sixth, 1917, Congress passed the Trading with the Enemy Act and vested in the President the power to capture all

enemy property. Section 7-a of that Act required all corporations who had any enemy shareholders to file a list of them as of February third, 1917, and in December, 1917, Hans E. Stöhr and his counsel, one Heyn, an American, in accordance with the duty so imposed, made a report on behalf of Stöhr & Sons, Inc., and the Botany Worsted Mills. Correspondence and several interviews ensued, and on February ninth, 1918, Heyn wrote a letter to the Custodian purporting to set forth all the facts. As to the fourteen thousand nine hundred shares, he said as follows: "These shares were in the name of H. E. Stöhr and M. W. Stöhr as trustees for Stöhr & Co., the Leipzig corporation, the beneficial interest being in Stöhr & Co. Regarding the contract for the purchase of said fourteen thousand nine hundred shares of Stöhr & Sons, Inc., from Stöhr & Sons of Leipzig, it has been fully explained that the control of Botany might be imperilled by a state of war because the voting right on stock of alien enemies or in which alien enemies had a beneficial interest (as was the case with said fourteen thousand nine hundred shares) was doubtful under the decisions of the courts, and if deprived of the voting right the control of Botany might be lost. This contract was made with reference to the control of Botany as between its stockholders and had of course no reference to the status of such control so far as the Alien Property Custodian is concerned. Such status is not affected whether such shares are in Stöhr & Co., the Leipzig corporation, or in Stöhr & Sons, the New York corporation. As we also stated verbally, there have been no resolutions or other corporate action by Stöhr & Company with the Leipzig corporation in confirmation of this transaction." Later in the same letter he said: "Considerably more than a majority of the stock [of Botany] is controlled by enemy alien interests within the meaning of the Alien Enemy Act. The total of the stock thus controlled (directly or indirectly) being 30,080 shares."

A copy of this letter at some time not definitely stated was approved in writing by Hans E. Stöhr. Before Heyn wrote it Hans E. Stöhr, who was himself not allowed to go to Washington, had written to Heyn two letters on February fifth, 1918. In one he gave a list of the stockholders of the Botany Worsted Mills and among the foreign stockholders he listed the Leipzig corporation for fourteen thousand nine hundred shares; the other read as follows: "I herewith wish to state that the majority of the stock of the Botany Worsted Mills, Passaic, N. J., and of Stöhr & Sons, Inc., N. Y., is held by parties who are alien enemies under the Trading with the Enemy Act. (This information is given by me as treasurer of the Botany Worsted Mills and as president of Stöhr & Sons, Inc.)" A majority of the shares of the Botany Worsted Mills necessarily included the shares here in question.

On April fifth, 1918, the Alien Property Custodian served a demand under Section 7-c of the Trading with the Enemy Act and Sections 2-a and 2-b of the Executive Order of February twenty-sixth, 1918, assuming to capture all the right, title and interest of the Leipzig company in the shares of stock of the Botany Worsted Mills. This was followed by a second demand later, and in February, 1919, he served another demand to capture all the interest of the

Leipzig company in the contract of February twentieth, 1917. By virtue of the transfer so effected, the Custodian obtained the registry in his own name upon the books of the Botany Worsted Mills of the shares of the Leipzig corporation and elected the individual defendants as directors of that company and of Stöhr & Sons, Inc. Both corporations have been under the control of such directors or their successors from that time until the present. In the autumn of 1918

the Custodian, as allowed by Section Twelve of the Trading
532 with the Enemy Act as amended, advertised for December second, 1918, the sale of a large number of shares of the Botany Worsted Mills, including the Leipzig company's shares. Section Twelve prevents any person not an American citizen from bidding at such a sale. He also in his advertisement annexed those conditions described in the bill. The bill was filed on December second, 1918, and the sale was postponed. Heyn and Hans E. Stöhr have since died.

Upon the trial the plaintiff insisted that Hans E. Stöhr was authorized to execute the contract of February twentieth, 1917, in the name of the Leipzig company and prayed that the trial should be postponed until it were possible to obtain evidence of that fact in Germany. The court reserved decision upon that question until it could learn whether the issue was material to a disposition of the case, meanwhile requiring of the plaintiff to submit by affidavit the particulars of such proof as he could make if permitted.

Louis Marshall and Louis J. Vorhaus for the Plaintiff.

George L. Ingraham, Lee C. Bradley and William H. Sadler, Jr. for the Alien Property Custodian.

John Quinn and Paul Kieffer for the other Defendants.

LEARNED HAND, D. J.:

This suit, in spite of its claim under Sections twenty-four and fifty-seven of the Judicial Code, must be regarded as dependent for jurisdiction upon Section nine of the Trading with the Enemy Act. The plaintiff filed a claim, avowedly made under that act, a few
533 days before bill filed, which he made a part of the bill itself, and there is, therefore, no procedural condition lacking to his rights. The fact that he has claimed jurisdiction erroneously need make no difference, if the evidence falls within that section, and especially if he has no other possible remedy. That he had none appears from a consideration of the purpose and structure of the act itself. Under Section seven (c) the President may seize all property which he decides to have enemy character, and under Section seven (c) all who comply with his demands get immunity in all courts. But nothing is settled by the capture itself except bare sequestration of the property in the hands of the Alien Property Custodian. It is quite true that under Section twelve as amended his powers are extended to include the general power to sell, but under Section nine any claimant friend may file a bill such as this, and either the bill automatically stays the sale, or at least the court

may stay it in a proper case, and such a suit Section nine makes the sole remedy of claimants. Thus it is apparent what the scheme of the act was. The reduction to possession of enemy property should be absolute, final and incontestible; it was to proceed by *ex parte* investigation and without right of review; it should include all property that the Alien Property Custodian decided to have enemy character. But it adjudicated nothing and its effect upon any right but that of possession was nil. In a suit under Section nine the investigation and decision are irrelevant. Instead of an original libel of information to condemn the property upon capture, which places the initiative upon the captor, the initiative in restoration is given to claimant friends, who, as soon as they choose within a fixed period, may reclaim under Section nine; until they do the Alien Property

Custodian is free to manage and even to sell under Section 534 twelve as amended. In the reclamation suit the validity of the capture is for the first time to be tested, and the question of title to be adjudicated. If the fixed period passes without any suit, the title by capture becomes good by a kind of prescription or limitation.

Such being the plainly disclosed plan of the act, it is apparent that the plaintiff here has no standing unless it be under Section nine, or unless the act be unconstitutional. The plaintiff does attack it as unconstitutional and this objection must first be considered. Cases like *McVeigh v. U. S.*, 11 Wall. 259; *McVeigh v. Windsor*, 93 U. S. 274, are not pertinent. They arose under the Civil War Confiscation Acts, which did not forfeit the property of all Confederates by virtue of their status, but of only six specified cases. There was no way for a claimant, even though an avowed Confederate, to prove that he was not within those classes except by appearance in the suit. To strike out his appearance in limine, on the ground that he was an enemy, as was done, was therefore to deny him the legal procedure accorded him by the statute. Section nine is the precise equivalent of this right, at least so far as concerns claimant friends, who are alone concerned here. The sole basis for the plaintiff's claim of unconstitutionality comes down, therefore, to the Custodian's power of initial sequestration *ex parte*. But how does this differ in substance from the customary right upon libels of information in rem to arrest whatever property officials may decide to be forfeit? Such property may not be reclaimed *pendente lite* by filing a bond; the claimant must endure the temporary loss of possession until the innocence of the res is adjudicated. The public purpose of the statute so far overrides this incident of his rights of property. How much more is this the case in time of war where the interests are vital? The difference is one merely of procedure, the substantial rights are the same, for capture effects no more than

an arrest in rem. The right to sell is the only addition and I have shown that this is at least subject to judicial control in the event of a bill filed under Section nine. The act therefore affords a complete remedy to all claimant friends, and is constitutional. As to claimant enemies, I have already considered its validity in *Kahn v. Garvan*, — Fed. R., —, but the point does not arise here.

The purpose of this suit is to prevent the sale of fourteen thousand nine hundred shares of stock in the Botany Worsted Mills, formerly owned by Kammgarnspinnerei Stöhr & Co., a German corporation doing business in Leipzig. All right of this corporation was captured under Section seven (c) and Sections two (a) and two (b) of the Executive order of February twenty-sixth, 1918, by the Alien Property Custodian's demand on April fifth, 1918, and all its rights under the contract of February twentieth, 1917, mentioned below were later captured in February, 1919. Nobody questions, as I understand it, that these demands effectively divested whatever rights the Leipzig company had against Stöhr & Sons, Inc., but the dispute is as to what these were. I shall assume for argument's sake that a shareholder may bring a representative suit in the right of his corporation under Section nine, and that the plaintiff here has shown a situation justifying his recognition in that capacity. I shall further assume, though the fact is in no way proved, that Hans E. Stöhr had a general authority which would cover the execution of contracts for the sale of such property as this for a consideration such as this. This assumption is all that the plaintiff has suggested he could prove if he had the chance to take proof in Germany.

536 The precise issue then becomes what rights the Alien Property Custodian got by his symbolic act of capture, and whether they gave him a right to sell under Section twelve. This question has nothing directly to do with the statute; it concerns first the rights of the Leipzig company; second, whether the belligerent rights of the United States were greater than the rights of the Leipzig company *inter partes*. If, then, Stöhr & Sons, Inc., has no interest in the shares which forbids the sale, the capture made the Custodian an unconditional *cestui que trust* by substitution under the transfer of 1915 to Hans and Max Stöhr. They, being dry trustees, cannot complain of the transfer of legal title to the Custodian's name, and Section twelve authorizes the sale. The question in the end turns upon the effect of the contract of February twentieth, 1917, which, viewed merely within its four corners, purported to convey to Stöhr & Sons, Inc., the shares, which were registered as such on the Botany Worsted Mills books in professed compliance with its terms. I shall assume that "title" to the shares thereby vested in Stöhr & Sons, Inc., in spite of irregularity under the by-laws of Botany Worsted Mills. The contract, verbally taken, was one of two kinds—either a sale with the purchase price payable in five future annual installments, the Leipzig company meanwhile reserving a vendor's lien, or an option granted Stöhr & Sons, Inc., to buy one-fifth of the shares in five successive years, provided they made each payment within sixty days after due date. If the contract is valid at all against the United States, and if it was intended as written, on either interpretation the plaintiff is entitled to some relief, because under the first, the Leipzig company must sell under its vendor's lien, and such a sale would be free from the limitations of sales under

537 Section twelve as amended. If, on the other hand, Stöhr & Sons, Inc., has only an option, then it can be terminated

only on sixty days' notice and no such notice has been given. Therefore, if the contract is valid against the right of capture, the Alien Property Custodian must prove that it was not the true intent of the parties, and that the equitable right of the Leipzig company is unlogged by any equity of redemption or option. I shall first assume that it would be valid against the United States.

In order to ascertain the real intent of the parties on February twentieth, 1917, it is necessary first to consider their situation and the events of the day before. The firm of Stöhr & Sons was composed of three Germans and one naturalized American, whose interest amounted to less than two per cent. It was for all practical purposes, therefore, a German firm doing business in New York, and it was obvious after February third, 1917, the day when Count von Bernstorff received his ex equatur, that its existence was imperilled by the almost certain event of war. On February fifteenth, 1917, Max, the American partner, de Liagre and Röhligh, also naturalized Americans, executed a certificate to form a New York corporation of twenty-five hundred shares. In the certificate of incorporation Hans Stöhr was made a director and he became president at once. All the stock was by several transfers issued to Hans E., Max W. Stöhr and to Röhligh, in exchange for the firm property, having a net value of over one million dollars, and they held it when issued as "voting trustees" under the New York statute for five years. "Trust certificates" were issued by these trustees to the four Stöhrs in proportion to their interests in the old firm, except that Max, the American, held the certificates of Eduard and Georg, residing in Germany, in trust for them, a trust upon a trust.

538 The result was that on February nineteenth, 1917, the share of the German partners had not been put beyond the reach of capture any better than if the firm had remained in existence. All that was accomplished, and in my opinion all that was desired, was to secure the firm against dissolution in the event of war, and to insure the voting right in two Americans on whom Hans could rely, if his own right to vote on the shares became affected by his enemy character. I doubt whether the parties then or later thought of any possible confiscation at all, but if they did, it is clear either that they despaired of any successful evasion of it, or that they were constrained by motives of prudence or conscience. In any event they left the substantial interests of the partners susceptible to capture and confiscation.

On the following day Hans E. Stöhr, assuming to act for the Leipzig company, made the contract here in question with Stöhr & Sons, Inc. The plaintiff argues that it effected an immediate change of title to the shares here in suit and that it left in the Leipzig company no interest save a vendor's lien. The execution of that contract could have been actuated as little by a desire to escape capture by the United States as were the transactions on February nineteenth, 1917, and for the same reason. From the point of view of the Leipzig company nothing was gained. The first payment was a year in the future, and the rest succeeded annually. If the United States were

to confiscate enemy property, the consideration was as easily discovered as the shares; it would equally be lost. From the point of view of Stöhr & Sons, Inc., nothing was gained, because while the shares became the property of a New York corporation, all but two per cent of its shares, controlling the substantial interest in the assets, 539 was equally lost. Hence the contract was not *tabula in naufragio*; some other motive must be found.

On the other hand, it is clear, of course, that the contract was not a commercial transaction. The occasion is enough to prove this and the events leading up to it. Besides, the contract itself proves that it could not have been due to ordinary commercial motives. The Botany Worsted Mills had been a successful business, already twenty-eight years in existence and one of the largest and best equipped in the United States. No possible reason can be suggested for the sudden sale of nearly a majority of its shares, which was not based upon an emergency. Moreover, the consideration was inadequate. It expressly omitted the good will, which must have had a substantial value, and it fixed no present price at all, so that it insured nothing to the Leipzig company except a sale of one-fifth each year at the then book value of its "hard assets." If the shares fell in value, the Leipzig company bore the loss, both in general value and in book value; if they rose, it did not share the gain except in so far as that was reflected in book values. Possibly it is legitimate to observe also that our entrance into the war was likely to have that advantage to woolen mills which the event proved.

Now Hans E. Stöhr was not acting alone for himself and his family. The record does not show how many outside shareholders there were in the Leipzig company, but they were many. He was in the position of selling for an apparently inadequate consideration to his family, property in which other persons were interested as well as they. The contract if not, therefore, justified upon the principle of selling to Crassus a burning house, could not be justified at all; it was apparently a fraud. And even if not clearly such, it was void-able at the instance of any single German shareholder who 540 chose to protest. It was not likely that Heyn, a capable adviser, should have seriously expected a contract with such infirmities to stand; indeed, it is not credible that the parties could have intended it as a commercial bargain at all, except it were, what it was not, a desperate catch at salvage.

Besides, to give even a colorable plausibility to the bargain, the plaintiff's position requires the assumption that the contract was mutual in its obligations. The point is not in any sense critical, but perhaps worth notice, because it was pretty clearly not a contract of purchase, but only an option. Of course, I am aware of the doctrine that bilateral obligations are generally presumed in like case, and that the courts will light on such words as "agreed" and the like, when they need them, but all such canons are only guides to the interpretation of general intent. I should perhaps think that the obligations were mutual, were it not for article five, but that being there, the omission of any express promise to pay may well have been de-

liberate. Article five in terms provides that the remedy of the Leipzig company on default shall be one which is in substance strict foreclosure, and that after strict foreclosure there shall be no further right of action on either side. It is quite true that it does not expressly say that this shall be the only remedy, but in view of the conclusion of the article I should be disposed so to construe it, especially when, as I have said, there are elsewhere no express covenants to pay the purchase price. It is unexpected, to say the least, that an experienced lawyer like Heyn should have introduced a clause of strict foreclosure in a genuine contract of sale, knowing it to create a forfeiture. The structure of the contract, therefore, if the case turned on it, would lead me to call it an option.

541 The surroundings confirm that conclusion. As I have shown, while the contract was heavily weighted against the Leipzig company, conceivably it might involve Stöhr & Sons, Inc., in embarrassing obligations, because the transaction was large. After the annual appraisals, the shares might fall; the company might be on an obvious decline. Some recalcitrant Leipzig shareholder might insist upon ratification of the bargain and place Stöhr & Sons, Inc., in an awkward predicament. But if it were only an option, all this would be avoided. The omission to include any promise to pay at least fits with that purpose not to induce the Leipzig company to call for performance, which may be inferred from the unequal inducements of the contract to either party. If the contract were never intended to be enforced, and if some of the Leipzig shareholders were not altogether reliable, we should look for a contract in substance and in form not dissimilar.

But as an option for five thousand dollars to purchase during a period of five years five million dollars of shares at prices which confessedly omitted an important element of value, the contract is too open a fraud upon the Leipzig company to admit even of argument. Hans E. Stöhr and Heyn were not engaged in any such enterprise; the plaintiff would be the last to suggest that they were. Therefore, I think I may say that it is demonstrated that neither was the contract intended to sell out in an emergency so as to escape putative capture, nor was it a genuine business transaction dependent upon an estimate of the mutual advantages of the parties. There remains only the possibility that it was not intended to represent the real purpose of the parties at all, but to serve as a cover for another purpose.

We are, moreover, not left to surmise as to what that purpose 542 was, because the written statements of Hans E. Stöhr and Heyn just before the capture very frankly disclose it. It was merely the continuation of what they had done in 1915, when they put the legal title in the name of Hans E. and Max W. Stöhr for convenience of management, and what they had done in the case of the partnership just before February twentieth, 1917, for the same reason. They wished to put their house in order against the disabilities and inaccessibility of their German associates during the period of a war which could certainly not go more than five years. This they did, so far as I can see, without the slightest anticipation of any

confiscation of enemy property—which had indeed been generally supposed for over a century to be obsolete.*

Hans E. Stöhr wrote two letters to Heyn on February fifth, 1918, while Heyn was in Washington, arranging so far as he could the affairs of the Stöhrs with the Alien Property Custodian. In one letter he said that the shares in question were owned by the Leipzig company; in the other that the majority of the Botany Worsted Mills was enemy owned. Each was probably intended for transmission to the authorities, and each flatly contradicted the contract of February twentieth, 1917, at least unless it was an option, which,

as I have shown, is incredible. When Heyn came to make
543 his final statement, cumulative upon the earlier reports under

Section seven (a)—a statement which Hans expressly approved—he specifically mentioned the contract of February twentieth, 1917, and referred it exclusively to the supposed danger to the voting control of the Botany Worsted Mills. It "had," said he, "of course no reference to the status of such control so far as the alien property custodian is concerned. * * * Considerably more than a majority of its stock is controlled by alien enemy interests within the meaning of the Alien Enemy Act." This information was given in compliance with Section seven (a), the second paragraph of which requires a statement as of February third, 1917, of all enemy shareholders who the corporate officer had cause to suppose then or later owned any shares. Heyn would have had to disclose that Hans E. and Max W. Stöhr were trustees on February third, 1917, for so the books would show. The section in addition required him to say what shares were enemy owned though standing in the name of another when the report was filed. He was therefore positively required to state the character of the relations arising under the contract of February twentieth, 1917, and his account of it was authoritative. There can be no question that, had the Leipzig company had only a vendor's lien, it would have been a wrong upon Stöhr & Sons, Inc., to fail to state its full rights. In saying that the "control" for purposes of the act was in the Leipzig company, I may fairly suppose that he had in mind those provisions of Section seven (a) under which he was acting; he used "control" as "owned."

Heyn and Hans E. Stöhr are now dead, but the aspect which the plaintiff seeks to put upon the contract is an apocryphal afterthought, which there is no reason whatever to suppose that they, were they

*Oppenheim, International Law, Vol. II, §102.

Halleck, International Law, Chap. XIX, §§12-21.

Wheaton, International Law, 5th Eng. Ed. (1916), pp. 417, 418, 419, 424, 425, 426.

Hall, International Law, 6th Ed. (1909), pp. 431-435.

Twiss, The Law of Nations, §§53-56,

Westlake, International Law, Vol. II (1907), pp. 38-44.

Hague Second Conference, Art. 53, "Regulations Respecting the Laws and Customs of War on Land."

Magna Carta, §41, seems to have contained the germ of the same idea.

544 alive, would now have the disposition, or the hardihood, to adopt. Their declarations ante litem motam fit that interpretation, which alone acquits them at once of any purpose to defraud either their associates, or the United States in its right as captor. I have no question that the beneficial ownership of the Leipzig shares was always intended to remain in the Leipzig company.

The question whether the contract was invalid as a fraud on the belligerent rights of the United States is not, therefore, of critical consequence, in view of the completeness of the proof that there never was any transfer at all. The nearest authorities I have been able to find are those relating to prize. It was well settled before the Great War that under French law no transfers of cargo or bottoms, *flagrante bello*, were valid, this being recognized as in diminution of the belligerent's right of capture, though under American and British law the same doctrine did not obtain.* In those countries such transfers are valid, but only if made while the goods or vessel are not in transitu. *The Benito Estenger*, 176 U. S. 568, *The Bawean*, 1917, Prob. Div. 58, *The United States*, 1916, Prob. Div. 30. The claimant must, moreover, even when the goods were not in transitu, establish an unconditional transfer, and the scrutiny as to this point is especially severe, any retention of enemy interest being sufficient to prevent its being regarded as absolute. *The Benito Estenger*, supra, *The Sechs Geschwistern*, 1 Ch. Rob. 190, *The Jemmy*, 4 Ch. Rob. 31. If the sale were absolute of a vessel or cargo not in transitu, being good, *flagrante bello*, it was a *fortiori* good, imminent
545 bello. But if the sale be *imminente bello*, and in contemplation of war and to avoid capture, the same limitations applied, *The Daksa*, 1917, App. Cas. 386, *The Southfield*, 1917, App. Cas. p. 390, note (Sir S. E. Evans), *The Tommi*, 1914, Prob. Div. 251, *The Jan Frederick*, 5 Ch. Rob. 115, *The Vrow Margaretha*, 1 Ch. Rob. 337, *The Baltica*, 11 Moore P. C. 141. Thus, an absolute sale of goods in transitu, or a sale with reservation, is void if made to avoid capture. In general it is the rule that the enemy character of the goods depends upon their character at the outset of the voyage. *The Packet de Bilbao*, 2 Ch. Rob. 133, *The Ann Green*, Fed. Cas. 414.

It is quite true that the right of capture on land depends upon the action of Congress, *Brown v. U. S.*, 8 Cranch. 110, and is not a part of our customary law arising from a state of war. Yet the incidents of sea capture might in the absence of contrary legislative expression be perhaps looked to as a fair analogy. The reason of the rule which makes the *transitus* a test of the validity of a transfer, im-

*Oppenheim, International Law, War §§91, 92.

Westlake, International Law, Part II, ed. 1907, p. 150.

Hall, International Law, Part III, chap. VI 6th Ed., 499, 500.

Wheaton, International Law, 5th Eng. Ed., 576, 577.

Twiss, Law of Nations, Part II, §§162, 163.

The Declaration of London, §§56, 57, made certain modifications in the British and American rule.

minente bello, was considered by the Privy Council in *The Baltica*, supra, and it was held to be the difficulty involved in detecting reserved enemy interests. Therefore, a ship was restored when delivery was made to the transferee at an intermediate port. The theory was repudiated that while at sea the belligerent's rights are already inchoate and that the ship has come, as it were, already into the jurisdiction of the captor.

In spite of *The Baltica*, supra, it might still be that sales of goods within enemy territory, imminente bello, and to avoid capture, ought to be regarded as in fraud of belligerent rights, if the statute said nothing. A serious argument might be made in favor of such a result, once a policy of land capture be inaugurated, but under this act it appears to me that Section seven (b) effectively

546 closes any such discussion. A part of the first paragraph of that section reads as follows: "no person shall by virtue of any assignment * * * to him of any * * * chose in action by * * * an enemy * * * have any right or remedy against the * * * obligor * * * unless said assignment * * * was made prior to the beginning of the war." It might indeed be open to a good deal of question whether this included an assignment of equitable interests in shares of stock, *Brown v. Fletcher*, 235 U. S. 589, though shares are analogous to choses in action, *Jellinik v. Huron Copper Co.*, 77 U. S. 1, and a fortiori equitable interests in shares. But I think that the purpose of the statute is pretty clearly indicated even if its letter do not cover this precise case. It can scarcely be supposed that an exception would be made in favor of ante bellum transfers of choses in action which did not apply to property so nearly akin as this, or indeed to all property, and it is clear that absolute transfers of choses in action before April sixth, 1917, would be valid. Apparently the United States meant not to inquire into such transfers as in fraud of its rights. There is no reason to extend the application of so penal a statute beyond its fair import; therefore, the capture must stand upon the ground that the contract conveyed nothing to Stöhr & Sons, Inc. Upon that ground it finds sufficient support.

It becomes unnecessary to consider the prayer of the plaintiff for letters rogatory.

Upon the understanding that this suit now concerns only the fourteen thousand nine hundred shares of the Leipzig company, the bill will be dismissed with costs.

April 21, 1920.

LEARNED HAND,
D. J.

547 At a Stated Term of the District Court of the United States in and for the Southern District of New York Held at the United States Courts and Post Office Building, in the Borough of Manhattan, New York City, on the 13th Day of May, 1920.

Present: Honorable Learned Hand, District Judge.

E. 15-327.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in
Stoehr & Sons, Inc., and in Behalf of All Others Similarly Situ-
ated, Complainant,

against

JAMES N. WALLACE, THOMAS PREHN, FERDINAND KUHN, ANDREW
B. Duvall, Walter S. Jones, Thomas F. Martin, Thomas J. Ma-
loney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney,
Richard Stockton, Francis P. Garvan, Individually and as Alien
Property Custodian; Stoehr & Sons, Inc., Botany Worsted Mills,
and Paul Kieffer, Defendants.

This cause came on to be heard at this term, and was argued by
counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed that the original and supplemental
bills of complaint herein be and they hereby are dismissed upon the
merits, with costs to the defendants to be taxed.

LEARNED HAND,

U. S. D. J.

547½ [Endorsed:] E. 15-327. Jun. 11, 1920. Recd. & Order
Given. V. Taylor. Form No. 336. U. S. District Court,
Southern District of New York. Max W. Stoehr versus James N.
Wallace et al. Order with Notice of Entry. Francis G. Caffey,
United States Attorney, Solicitor for Deft. Garvan, individually and
as A. P. C. Due service of a copy of the within is hereby admitted.
New York, —, 19—. —, Attorney for —. To
Valentine Taylor, Esq., Attorney for Complainant, 52 Wall St. U.
S. District Court, S. D. of N. Y. Filed May 13, 1920. Copy received
Jun. 11, 1920, 3.51 P. M. House, Grossman & Vorhaus, by —
—Attys. for —.

SIR:

You will please take notice that an Order of which the within is a
copy, was this day duly entered in the within-entitled action, in
the office of the Clerk of the U. S. District Court, Southern District
of N. Y.

Dated, N. Y., May 13, 1920.

Yours, etc.,

FRANCIS G. CAFFEY,

U. S. Attorney, Solicitor for Defendant

Francis P. Garvan, Individually

and as A. P. C.

548 United States District Court, Southern District of New York.

MAX W. STOCHR, Suing in His Own Behalf as a Stockholder in Stoehr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE, THOMAS PREHN, FERDINAND KUHN, ANDREW B. DUVALL, Walter S. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney, Richard Stockton, Francis P. Garvan, Individually and as Alien Property Custodian; Stoehr & Sons, Inc., Botany Worsted Mills, and Paul Kieffer, Defendants.

Petition for Appeal.

To the Honorable Learned Hand, judge of said court:

Max W. Stoehr, the complainant in the above entitled action, by Valentine Taylor, his solicitor, feeling himself aggrieved by the final Decree of this Court, entered on the 13 day of May, 1920, dismissing his original and supplemental bills of complaint upon the merits at the plaintiff's cost, hereby prays that an appeal may be allowed to him from the said Decree to the Supreme Court of the United States and, in connection with this petition, petitioner herewith presents his assignment of errors.

VALENTINE TAYLOR,
Solicitor for Complainant.

LOUIS MARSHALL,
LOUIS J. VORHAUS,
Of Counsel.

549 [Endorsed:] United States District Court, Southern District of New York. Max W. Stoehr, suing in his own behalf as a stockholder in Stoehr & Sons, Inc., etc., Complainant, against James N. Wallace, & ano., Defendants. Copy. Petition for appeal. Valentine Taylor, Attorney for Complainant, No. 52 Wall Street, New York City. U. S. District Court, S. D. of N. Y. Filed May 14, 1920.

550 UNITED STATES OF AMERICA, vs.:

To James N. Wallace, Thomas Prehn, Ferdinand Kuhn, Andrew B. Duvall, Walter S. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney, Richard Stockton, Francis P. Garvan, Individually and as Alien Property Custodian; Stoehr & Sons, Inc., Botany Worsted Mills, and Paul Kieffer, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty

(30) days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the United States District Court for the Southern District of New York, wherein Max W. Stoehr, suing in his own behalf as a stockholder in Stoehr & Sons, Inc., and in behalf of all others similarly situated, is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness: The Honorable Edward D. White, Chief Justice of the United States this 13 day of May, 1920.

LEARNED HAND,

*Judge of U. S. District Court for
Southern District of New York.*

551 [Endorsed:] United States District Court, Southern District of New York. Max W. Stoehr, suing in his own behalf as a stockholder, etc., Complainant, against James N. Wallace & ano., Defendants. Copy. Citation. Valentine Taylor, Attorney for Complainant, No. 52 Wall Street, New York City. U. S. District Court, S. D. of N. Y. Filed May 14, 1920.

552 United States District Court, Southern District of New York.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder of Stoehr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE, THOMAS PREHN, FERDINAND KUHN, ANDREW B. DUVALL, Walter S. Jones, THOMAS F. MARTIN, THOMAS J. MALONEY, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney, Richard Stockton, Francis P. Garvan, Individually and as Alien Property Custodian; Stoehr & Sons, Inc., Botany Worsted Mills, and Paul Kieffer, Defendants.

Assignment of Errors.

Now comes the appellant, Max W. Stoehr, by Valentine Taylor, his solicitor, and in connection with his petition for appeal says:

That in the record, proceedings and in the Decree rendered in this suit by the United States District Court for the Southern District of New York on May 13, 1920, manifest error has intervened to the prejudice of the appellant, to wit:

I.

The Court erred in holding that the Act of Congress known as "Trading with the Enemy Act," approved October 6th, 1917, and the amendments thereto approved March 28, 1918 and November

12, 1918, in so far as the same undertook to permit the seizure of the property of Stoehr & Sons, Inc., a New York corporation, ex parte and without affording to it a hearing or an opportunity to be heard and to confer upon the Alien Property Custodian the right to sell the property so seized without proceedings before a judicial tribunal, was constitutional.

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II.

The Court erred in refusing to hold that in so far as the Alien Property Custodian undertook ex parte and without a legal proceeding based upon notice and a hearing or an opportunity to be heard in court, to take possession of the shares of stock of the Botany Worsted Mills belonging to Stoehr & Sons, Inc., and to determine that such shares belonged to Kammgarnspinnerei Stoehr & Co. Aktiengesellschaft, or any other enemy, his action was null and void and in violation of the due process clause of the Constitution of the United States.

III.

The Court erred in refusing to hold that any title that may have accrued to Stoehr & Sons, Inc., under the terms of the contract of February 20, 1917, was not divested by the passage of the "Trading with the Enemy Act," and in refusing to hold that in so far as said Act undertook to divest such title it constituted a deprivation of property without due process of law within the meaning of the due process clause of the Constitution of the United States.

IV.

The Court erred in refusing to hold that the sale attempted by the Alien Property Custodian of the shares of stock of the Botany Worsted Mills claimed by Stoehr & Sons, Inc., a New York Corporation, in the absence of a judgment in a proceeding duly instituted and conducted in accordance with due process, constituted a violation of the right of property of Stoehr & Sons, Inc., within the meaning of the due process clause of the Constitution of the United States.

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V.

The Court erred in holding that Stoehr & Sons, Inc. acquired no title to the 14,900 shares of stock of the Botany Worsted Mills described in the contract of February 20, 1917.

VI.

The Court erred in holding that the shares of stock of the Botany Worsted Mills described in the contract of February 20, 1917, were not put beyond the reach of capture by the execution of such contract.

VII.

The Court erred in holding that the contract of February 20, 1917, did not constitute an executed sale but a mere option to purchase the 14,900 shares of stock of the Botany Worsted Mills which were the subject-matter of said contract.

VIII.

The Court erred in holding that the contract of February 20, 1917, did not convey to Stoechr & Sons, Inc. the title to the 14,900 shares of stock of the Botany Worsted Mills therein described.

IX.

The Court erred in not holding that by the terms of the agreement of February 20, 1917, Stoechr & Sons, Inc. acquired at least the equitable title to the 14,900 shares of the capital stock of the Botany Worsted Mills which are the subject-matter of that instrument.

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X.

The Court erred in not holding that the transfer of the title to the 14,900 shares of the capital stock of the Botany Worsted Mills to Stoechr & Sons, Inc. was accomplished on February 20, 1917, and that subsequent events did not invalidate such transfer.

XI.

The Court erred in not holding that the equitable title to the 14,900 shares of the Botany Worsted Mills having passed to Stoechr & Sons, Inc. on February 20, 1917, the fact that the consideration was to be paid later and that the shares of stock pledged as collateral security were to be redelivered from time to time as the instalments of the purchase price were paid, did not affect the title or render the contract executory or subject to dissolution upon the declaration of war.

XII.

The Court erred in not holding that Stoechr & Sons, Inc., the owners of the 14,900 shares of stock of the Botany Worsted Mills, an American corporation, was not an enemy or ally of an enemy within the meaning of the "Trading with the Enemy Act," and that they were not therefore subject to capture or seizure under its terms, and that the act of the Alien Property Custodian in condemning them as enemy-owned property upon his determination that they were such was without jurisdiction and void.

XIII.

The Court erred in not holding that the proposed sale by the Alien Property Custodian of the 14,900 shares of stock of the Botany Worsted Mills would constitute a violation of the true intent and meaning of the "Trading with the Enemy Act."

XIV.

The Court erred in dismissing the bill of complaint for want of equity and in entering the final decree to that effect against the complainant.

XIV.

The Decree of the District Court in favor of the defendants is contrary to the law and the evidence in the case.

Wherefore, appellant prays that the Decree of the United States District Court for the Southern District of New York aforesaid may be reversed with directions to enter a Decree herein as prayed for in the bill of complaint herein.

VALENTINE TAYLOR,
Attorney for Appellant.

LOUIS MARSHALL,
LOUIS J. VORHAUS,
Of Counsel.

557 [Endorsed:] United States District Court, Southern District of New York. Max W. Stoehr, suing in his own behalf as a stockholder, etc., complainant, vs. James N. Wallace and ano., defendants. Assignment of errors. Valentine Taylor, Atty. for complainant, No. 52 Wall Street, New York City. U. S. District Court, S. D. of N. Y. Filed May 14, 1920.

558 Know all men by these presents, That we Max W. Stoehr, as principal, and National Surety Company a New York Corporation, of No. 115 Broadway, New York, New York, as surety, are held and firmly bound unto James N. Wallace, Thomas Prehn, Ferdinand Kuhn, Andrew B. Duvall, Walter S. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney, Richard Stockton, Francis P. Garvan, individually and as Alien Property Custodian, Stoehr & Sons, Inc., Botany Worsted Mills and Paul Kieffer, in the full and just sum of One Thousand (\$1,000.00) Dollars, to be paid to the said James N. Wallace, Thomas Prehn, Ferdinand Kuhn, Andrew B. Duvall, Walter S. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney, Richard Stockton, Francis P. Garvan, individually and as Alien Property Custodian, Stoehr & Sons, Inc., Botany Worsted Mills and Paul Kieffer, their executors, administrators or assigns; to which payment, well and

truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 13th day of May, in the year of our Lord one thousand nine hundred and twenty.

Whereas, lately, to wit, on the 13th day of May, 1920, at the District Court of the United States for the Southern District of New York, in a suit pending in said Court between Max W. Stoechr, suing in his own behalf as a stockholder in Stoechr & Sons, Inc., and in behalf of all others similarly situated, complainant, and James N. Wallace, Thomas Prehn, Ferdinand Kuhn, Andrew B. Duvall,

Walter S. Jones, Thomas F. Martin, Thomas J. Maloney
559 Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney, Richard Stockton, Francis P. Garvan, individually and as Alien Property Custodian, Stoechr & Sons, Inc., Botany Worsted Mills and Paul Kieffer, defendants, a Decree was rendered against the said complainant dismissing his bill and supplemental bill for want of equity on the merits with costs, and the said Max W. Stoechr having obtained an appeal to the Supreme Court of the United States to reverse the Decree in the aforesaid suit.

Now, the condition of the above obligation is such, That if the said Max W. Stoechr shall prosecute his appeal to effect and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

MAX W. STOCHR, [L. S.]
NATIONAL SURETY COMPANY, [L. S.]
By H. E. EMMETT,
Resident Vice-President.

Dated, New York, May 13th, 1920.

Attest:

E. M. MCCARTHY,
Resident Assistant Secretary.

Approved by:

LEARNED HAND,
Judge.

STATE OF NEW YORK,
County of New York, ss:

On this 13th day of May, 1920, before me personally appeared Max W. Stoechr, to me known and known to me to be the individual described in and who executed the within bond, and he acknowledged to me that — executed the same.

F. F. FIELDS,
Notary Public, etc.

560

National Surety Company.

Capital, \$4,000,000.00.

Affidavit, Acknowledgment, and Justification by Guaranty or Surety Company.

STATE OF NEW YORK,

County of New York, ss:

On this 13th day of May, one thousand nine hundred and twenty, before me personally came H. E. Emmett, known to me to be the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing bond of Max W. Stoehr, as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company, is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of Max W. Stoehr is the corporate seal of said National Surety Company, and was thereto affixed by the order and authority of the Board of Directors of said Company; that he signed his name thereto by like order and authority as Resident Vice-President of said Company; that he is acquainted with E. M. McCarthy and knows him to be the resident Assistant Secretary of said Company; that the signature of said E. M. McCarthy subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy and was thereto subscribed by order and authority of said Board of Directors; and in the presence of said deponent; that the assets of said Company, un-
560½ encumbered and liable to execution, exceed its debts and liabilities of every nature whatsoever, by more than the sum of Eight Million (\$8,000,000) Dollars.

That ——— is the agent to acknowledge service for said Company in the Judicial District wherein this bond is given.

H. E. EMMETT.

(Deponent's signature.)

Sworn to, acknowledged before me, and and subscribed in my presence this 13th day of May, 1920.

F. E. FIELDS.

(Officer's signature, description, and seal.)

[Endorsed:] Filed May 14, 1920. U. S. District Court, S. D. of N. Y.

561 United States District Court, Southern District of New York.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in
Stoehr & Sons, Inc., and in Behalf of All Others Similarly
Situating, Complainant,

against

JAMES N. WALLACE, THOMAS PREHN, FERDINAND KUHN, ANDREW
B. Duvall, Walter S. Jones, Thomas F. Martin, Thomas J.
Maloney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney,
Richard Stockton, Francis P. Garvan, Individually and as Alien
Property Custodian; Stoehr & Sons, Inc., Botany Worsted Mills,
and Paul Kieffer, Defendants.

On reading the Petition of Max W. Stoehr, the complainant
herein, for appeal, and upon consideration of the assignment of
errors presented therein, it is

Ordered, that an appeal be and the same is hereby allowed to the
said complainant from the final decree of this Court, entered on the
13 day of May, 1920, dismissing upon the merits the original and
supplemental bills of complaint herein, to the Supreme Court of
the United States, as prayed for in his Petition, on the condition
that the said complainant do file an appeal bond in the sum of
One Thousand (\$1,000.00) Dollars.

And an appeal bond in due form in the sum of One Thousand
(\$1,000.00) Dollars, with Max W. Stoehr as Principal, and National
Surety Company as Surety, having been presented to the
562 Court, the same is hereby approved.

And for good cause shown, it is

Ordered that the time within which appellant is to file the record
in the Supreme Court of the United States be, and the same is
hereby extended ninety (90) days from this date.

Dated, New York, May 13, 1920.

LEARNED HAND,

*Judge U. S. District Court for the
Southern District of New York.*

563 [Endorsed:] United States District Court, Southern Dis-
trict of New York. Max W. Stoehr, suing in his own behalf
as a stockholder, etc., Complainant, against James N. Wallace & ano.,
Defendants. Copy. Order. Valentine Taylor, Attorney for Com-
plainant, No. 52 Wall Street, New York City. U. S. District Court,
S. D. of N. Y. Filed May 14, 1920.

564 District Court of the United States for the Southern District of New York.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in Stoehr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE et al., Defendants.

On motion of the Solicitor for the Complainant and appellant, and for good cause shown, it is

Ordered, That the time within which the statement of the evidence may be filed and settled by the trial judge in the above entitled cause be and is hereby extended to September 14, 1920.

It is further ordered, that the time within which the record on appeal in the above entitled cause is to be filed in the Supreme Court of the United States, be and is hereby extended to September 17, 1920. Enter,

(Signed)

July 13, 1920.

LEARNED HAND,
*U. S. District Judge,
Southern District of New York.*

U. S. District Court, S. D. of N. Y. Filed July 14, 1920.

565 In the District Court of the United States for the Southern District of New York.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in Stoehr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE, THOMAS PREHN, FERDINAND KUHN, ANDREW B. Duvall, Walter S. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney, Richard Stockton, A. Mitchell Palmer, Individually and as Alien Property Custodian; Stoehr & Sons, Inc., Botany Worsted Mills, Francis P. Garvan, and Paul Kieffer, Defendants.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, New York, September 14, 1920.

LOUIS J. VORHAUS AND
ELIJAH N. ZOLINE,

Counsel for Complainant.

FRANCIS G. CAFFEY,

*Solicitor for Defendant Francis P. Garvan,
as Alien Property Custodian, and A.
Mitchell Palmer.*

JOHN QUINN,

Solicitor for All Other Defendants.

566 In the District Court of the United States for the Southern District of New York.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in Stoehr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE, THOMAS PREHN, FERDINAND KUHN, ANDREW B. Duvall, Walter S. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney, Richard Stockton, A. Mitchell Palmer, Individually and as Alien Property Custodian; Stoehr & Sons, Inc., Botany Worsted Mills, Francis P. Garvan, and Paul Kieffer, Defendants.

Amended Pra-cipe for Record.

The Clerk of this Court is hereby requested and directed to prepare and certify a transcript of record in the above entitled cause for the use of the Supreme Court of the United States on the appeal heretofore allowed in this case to the plaintiff, Max W. Stoehr, by including therein the following:

Bill of Complaint, Action Number 2.

Subpœna ad respondendum.

Supplemental Bill of Complaint, Action Number 2.

Order substituting Francis P. Garvan, as Alien Property Custodian, as of the defendants, for A. Mitchell Palmer, as Alien Property Custodian.

Answer of A. Mitchell Palmer.

Answer of Francis P. Garvan as Alien Property Custodian.

Answer of Botany Worsted Mills.

Answer of directors of Botany Worsted Mills.

Answer of Stoehr & Sons, Inc.

567 Answer of directors of Stoehr & Sons, Inc.

Transcript of testimony reduced to narrative form together with the exhibits as the same will be approved by the court.

Opinion of Judge Hand filed April 21, 1920.

Final decree signed by Judge Hand filed May 13, 1920.

Petition for appeal filed May 13, 1920.

Citation on appeal filed May 13, 1920.

Assignment of errors filed May 13, 1920.

Bond on appeal filed May 13, 1920.

Order allowing appeal to the Supreme Court and extending the time of the appellant to file the record in the Supreme Court of the United States ninety days from the date of said order, May 13, 1920.

Order extending the time within which the record on appeal in this

cause may be filed in the Supreme Court of the United States to September 17, 1920, said order being dated July 13, 1920.

Dated, September 1, 1920.

VALENTINE TAYLOR,
Solicitor for Plaintiff.

LOUIS J. MARSHALL,
LOUIS J. VORHAUS,
ELIJAH N. ZOLINE,
Counsel.

568 In the District Court of the United States for the Southern District of New York.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in Stoehr & Sons, Inc., and in Behalf of All Others Similarly Situated, Complainant,

against

JAMES N. WALLACE, THOMAS PREHN, FERDINAND KUHN, ANDREW B. Duvall, Walter S. Jones, Thomas F. Martin, Thomas J. Maloney, Herbert P. Howell, W. J. Hellmer, H. C. MacEldowney, Richard Stockton, A. Mitchell Palmer, Individually and as Alien Property Custodian; Stoehr & Sons, Inc., Botany Worsted Mills, Francis P. Garvan, and Paul Kieffer, Defendants.

It is hereby stipulated and agreed by and between the parties hereto that the amended pra-cipe for record hereto annexed be and the same hereby is substituted for the pra-cipe for record filed herein by the solicitor for the appellant on August 23, 1920, with the same force and effect as if the pra-cipe for record had been in the form of the amended pra-cipe for record hereto annexed and had been filed on August 23, 1920.

Dated, New York, September 1, 1920.

VALENTINE TAYLOR,
Solicitor for Complainant.
FRANCIS G. CAFFEY,
Solicitor for Defendant A. Mitchell Palmer
and for Defendant Francis P. Garvan,
as Alien Property Custodian.
JOHN QUINN,
Solicitor for other Defendants.

569 UNITED STATES OF AMERICA,
Southern District of New York, ss:

E. 15-327.

MAX W. STOEHR, Suing in His Own Behalf as a Stockholder in
Stoehr & Sons, Inc., etc., Complainant,

VS.

JAMES N. WALLACE et al., Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this fifteenth day of September in the year of our Lord one thousand nine hundred and twenty and of the Independence of the said United States the one hundred and forty-fifth.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

Endorsed on cover: File No. 27,903. S. New York D. C. U. S. Term No. 546. Max W. Stoehr, suing in his own behalf as a stockholder in Stoehr & Sons, Inc., and in behalf of all others similarly situated, appellant, vs. James N. Wallace et al. Filed September 16th, 1920. File No. 27,903.

(2523)

BY

J. H. HARRIS

FILE COPY

FILED

NOV 11 1920

JAMES D. MAHER,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1920.

No. 546.

MAX W. STOEHR, suing in his own behalf as a
stockholder of Stoehr & Sons, Inc., and in be-
half of all others similarly situated,

Appellant,

against

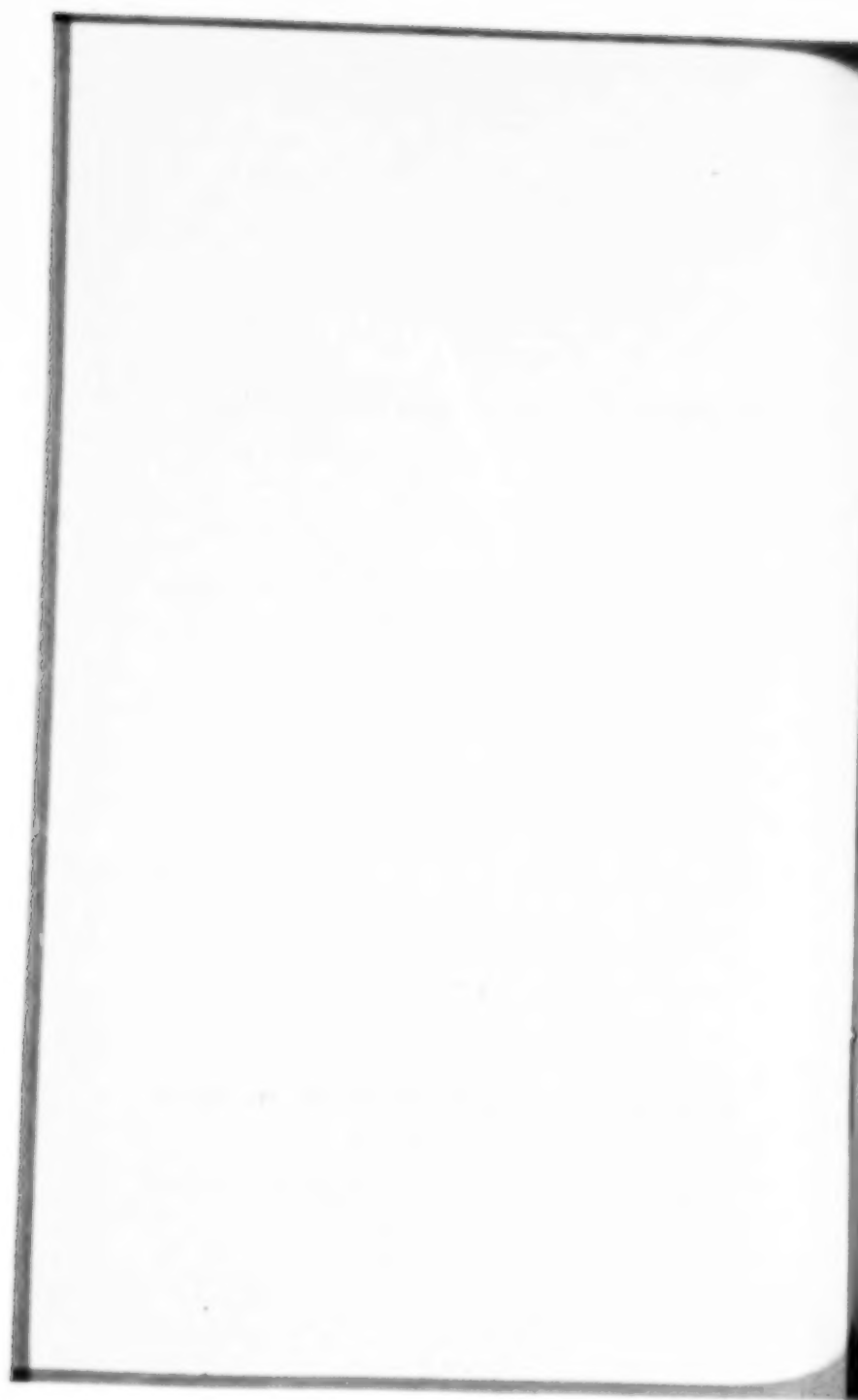
JAMES N. WALLACE, et al.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF NEW
YORK.

**APPELLANT'S ANSWER TO MOTION
TO ADVANCE.**

LOUIS MARSHALL,
LOUIS J. VORHAUS,
Of counsel.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1920.

MAX W. STOEHR, suing in his
own behalf as a stockholder of
Stoehr & Sons, Inc., and in be-
half of all others similarly
situated,

Appellant,

against

JAMES N. WALLACE, et al.,
Appellees.

No. 546.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF NEW
YORK.

**APPELLANT'S ANSWER TO MOTION
TO ADVANCE.**

The appellant recognizes the importance of this
cause and consents that it may be advanced, so
that the appeal herein may be argued during the

present term of court. He objects, however, to the hearing of the case during December, 1920, as requested by the Solicitor General, and suggests that such hearing be fixed for a day not later than the first Monday of February next.

The constitutional question involved is not the seizure and sale of property of alien enemies is unconstitutional. The 14,900 shares of the capital stock of the Botany Worsted Mills, the subject-matter of this suit, seized by the Alien Property Custodian, the sale of which was sought to be enjoined, were not owned by an alien enemy, but by Stoehr & Sons, Incorporated, a corporation organized under the laws of the State of New York, in whose right the plaintiff, who is a citizen of the United States, brought this action in his representative capacity as a stockholder. Appellant contends that such seizure without a hearing being first accorded to the owner, was a denial of due process of law. He also claims that the attempted sale by the Alien Property Custodian of these shares of stock, which could only have been accomplished at a great sacrifice and would have deprived the owner of the title and a substantial part of the value of his property, was likewise violative of the constitutional rights of the appellant and of the corporation which he represents. It is especially significant that such sale was to be made before Congress had determined the disposition to be made of property seized under the Trading with the Enemy Act, as provided in Section 12 of that statute.

The appeal in this case having been taken directly from the District Court, it became necessary to prepare the record for transmission to this

Court, which, on account of its length, occupied considerable time. The record has not as yet been printed and several weeks will elapse before such printing is completed. Appellant's counsel do not know when copies of the printed record will be in their possession, and without such record, the preparation of the brief will be difficult. For this reason and because of professional engagements which will occupy all of their time until the latter part of December, it will be physically impossible for them to complete satisfactorily the preparation of their argument upon the many important points involved until after January first next.

Respectfully submitted,

LOUIS MARSHALL,
LOUIS J. VORHAUS,
Appellant's Counsel.

FILE COPY

DEC 29 1920

JAMES D. MAHER
CL

Supreme Court of the United States

October Term, 1920

No. 546.

MAX W. STOEHR, suing in his own behalf as a stockholder
of Stoehr & Sons, Inc., and on behalf of all others similarly
situated,

Appellant,

against

JAMES N. WALLACE et al, FRANCIS P. GARVAN
Alien Property Custodian, and others,

Appellees,

Appeal from the District Court of the United States for the
Southern District of New York.

APPELLANT'S POINTS.

LOUIS MARSHALL,
LOUIS J. VORHAUS,
Of Counsel.



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Supreme Court of the United States

OCTOBER TERM, 1920.

No. 546.

MAX W. STOEHR, suing in his own
behalf as a stockholder of
Stoehr & Sons, Inc., and on be-
half of all others similarly sit-
uated,

Appellant,

against

JAMES N. WALLACE, *et al.*,
FRANCIS P. GARVAN, Alien
Property Custodian, and
others.

Appeal from
the District
Court of the
United States
for the
Southern
District of
New York.

APPELLANT'S POINTS.

The plaintiff has brought this action as a stockholder of the defendant Stoehr & Sons, Inc., a New York corporation, in his representative capacity, to restrain the Alien Property Custodian from selling 20,590 shares of the capital stock of the Botany Worsted Mills owned by Stoehr & Sons, Inc., and that he be adjudged to release and surrender the shares of stock owned by said Stoehr & Sons, Inc., so seized and taken

by him and to account for his acts in and about his attempted possession and control of such shares of stock (*Rec.*, pp. 1-20).

The material facts are practically admitted. Stoehr & Sons, Inc., hereinafter referred to as the New York Company, was incorporated on February 17, 1917, with a capital stock of \$250,000, consisting of 2,500 shares of the par value of \$100 each. The directors of this corporation were Hans E. Stoehr, Max W. Stoehr, Alfred de Liagre and George H. Röhlig. They were all residents of the State of New York and, with the exception of Hans E. Stoehr, were citizens of the United States (*Rec.*, pp. 184, 185). Max W. Stoehr came to this country on October 15, 1900, and was naturalized on May 25, 1911. Hans E. Stoehr, his brother, took up his residence here in 1902. He applied for citizenship but before he could secure his final citizenship papers he had removed from New Jersey to New York, and because of the lapse of more than five years after he had obtained his first papers it became necessary for him to take proceedings *de novo*, which he did in 1913 or the beginning of 1914. Both brothers were married and lived here with their families.

Prior to the formation of the New York Company, Hans E. Stoehr and Max W. Stoehr, together with their father, Eduard Stoehr, and a brother, George Stoehr, constituted a partnership under the name of Stoehr & Sons. Eduard and George Stoehr lived in Germany (*Rec.*, p. 100).

On February 19, 1917, the partnership of Stoehr & Sons offered to sell to the New York Company its business, property, good-will and other assets in consideration of \$250,000 of the capital stock of the company, full paid and non-assessable, and the assumption by the corporation of all of the

liabilities of Stoechr & Sons. This offer was accepted and the liabilities were assumed (*Rec.*, p. 188). In conformity with this agreement the New York Company acquired the property of Stoechr & Sons and issued all of its capital stock, amounting to \$250,000, to the members of the partnership of Stoechr & Sons (*Rec.*, pp. 187, 188), in the proportion of their respective interests in the partnership (*Rec.*, p. 102), and concurrently with this distribution, under a voting trust agreement dated February 19, 1917, wherein Hans E. Stoechr, Max W. Stoechr and George G. Röehlig were designated as voting trustees (*Rec.* pp. 197-199), voting trust certificates were issued for the benefit of Eduard Stoechr and George Stoechr to Max W. Stoechr as trustee, and to Hans E. Stoechr and Max W. Stoechr, covering their interests in the stock issued to them respectively for their interests in the partnership property of Stoechr & Sons (*Rec.*, pp. 102, 103).

The Botany Worsted Mills was a corporation organized in 1889 under the laws of New Jersey, with a capital stock of \$3,600,000, consisting of 36,000 shares of the par value of \$100 each. From the time of its incorporation it had been engaged in the business of manufacturing worsted and woolen cloths and yarns (*Rec.*, pp. 3, 105). The partnership of Stoechr & Sons was a stockholder of record of the Botany Worsted Mills prior to February 20, 1917, to the extent of 5,690 shares (*Rec.*, p. 101). A German company called "Kammgarn-Spinnerei Stoechr & Co., Aktiengesellschaft," hereinafter called the Leipzig Company, was on February 20, 1917, beneficially interested in 14,900 shares of the capital stock of the Botany Worsted Mills. 10,000 of these shares were transferred on the books of the company in the name of Hans

E. Stoechr, as trustee, on January 15, 1915, and 4,900 of these shares were transferred on the books of the company in the name of Max W. Stoechr, as trustee, on February 25, 1915 (*Rec.*, p. 106).

On February 20, 1917, the Leipzig Company entered into a contract with the New York Company whereby it sold, assigned and transferred to the latter all of its interest in these 14,900 shares, and concurrently with the execution of this agreement Hans E. Stoechr and Max W. Stoechr, as trustees, caused the shares to be transferred on the books of the Botany Worsted Mills to the New York Company (*Rec.*, pp. 14-16). The terms of this contract are fully set forth in the opinion rendered on the decision of this case (*Rec.*, pp. 306-308) and are hereafter discussed under Point I.

The property and plant of the Botany Worsted Mills were of great value. The corporation was organized on May 11, 1899, at the time of the outbreak of the war in 1917 employing approximately 7,000 men. Its plant was extensive, covering nearly 140 acres of land. It operated over 2,100 looms with nearly 100,000 spindles. The volume of its business in 1917 reached \$28,000,000, and is conceded to have been profitable (*Rec.*, pp. 105, 106; *Plaintiff's Exhibit 10, facing Rec.*, p. 204). *Plaintiff's Exhibits 11 and 12* (*Rec.*, pp. 206 to 210) show the financial statement for the years ending November 30, 1917 and November 30, 1918 respectively. At the time of the transfer of these shares the Botany Worsted Mills was under the direction and control of Hans E. Stoechr and Max W. Stoechr. George Röhlings, who was a nephew of Eduard Stoechr, and Alfred de Liagre, who was also a relative of the family, were likewise directors of the Botany Worsted Mills, (*Rec.*, pp. 120, 219).

On April 3, 1918, A. Mitchell Palmer, Alien Property Custodian, notified the Botany Worsted Mills of the seizure by him of the 14,900 shares of its stock standing on its books in the name of the New York Company (*Rec.*, pp. 204, 205), and from time to time further action was taken by Mr. Palmer and by his successor, Francis P. Garvan, as Alien Property Custodians, respecting the seizure of these shares, of the interest of Eduard and George Stoehr in the shares of the New York Company, and of the amount payable by the New York Company to the Leipzig Company for the purchase price of the 14,900 shares of the stock of the Botany Worsted Mills pursuant to the provisions of the contract of February 26, 1917 (*Defendants' Exhibits C1, D1, E1, G1, I1, J1, K1, L1, Rec.*, pp. 250-271).

Hans E. Stoehr died on March 18, 1918 (*Rec.*, p. 100). Herbert Heyn, Esq., of Heyn & Covington, who for some years had been the counsel of Stoehr & Sons and of the Botany Worsted Mills and under whose supervision the New York Company was organized and the contract between it and the Leipzig Company was executed, died on April 30, 1918 (*Rec.*, p. 112). George Röehlig died in October, 1918 (*Rec.*, p. 120).

Immediately after the seizure of the shares in Stoehr & Sons, Inc., owned by Eduard and George Stoehr and of the 14,900 shares of the Botany Worsted Mills owned by the New York Company, Mr. Palmer, as the Alien Property Custodian, called for the resignation of the then directors of the two companies, and chose as directors of the New York Company James N. Wallace, Francis P. Garvan, Andrew B. Duvall and Paul Kiefer. Messrs. Garvan and Duvall were connected with

the office of the Alien Property Custodian. Mr. Kiefer was associated with John Quinn, who was designated as the attorney of the New York Company and likewise of the Botany Worsted Mills (*Rec.*, pp. 113, 114). At the instance of Mr. Palmer, James N. Wallace, Andrew B. Duvall, Walter D. Jones, Thomas F. Martin, Thomas J. Maloney and H. C. MacEldowney were designated as directors of the Botany Worsted Mills (*Rec.*, p. 115). The circumstances under which these designations were made is explained at *Rec.*, pp. 113-116.

Although the business of the Botany Worsted Mills continued to be profitable and neither its property nor that of the New York Company was perishable or of such a character as to require immediate sale for its preservation, subsequent to November 11, 1918, the date of the Armistice, the Alien Property Custodian took proceedings for the sale, among other shares of the Botany Worsted Mills seized by him, of the 14,900 shares belonging to the New York Company. The shares of the Botany Worsted Mills had never been listed on any stock exchange and had never been traded in in the open market. The stock had no quotable market value. The same is true of the stock of the New York Company (*Rec.*, p. 117). The only American competitors of the Botany Worsted Mills were Forstman & Huffman, of Passaic, and the American Woolen Company. There were, however, important corporations in England and France who were engaged in the same business (*Rec.*, p. 117).

Without giving to the New York Company any notice that the Alien Property Custodian intended to sell these shares of stock, without legal

proceedings directing or authorizing such sale (*Rec., pp. 118, 119*), the Alien Property Custodian gave public notice that he would offer these shares for sale to the highest bidder at the front door of the main office of the Botany Worsted Mills, at Passaic, New Jersey, on December 2, 1918. The terms and conditions of the sale included the following:

"1. Said 25,700 shares of stock will be offered for sale in one parcel and as an entirety, and the bids therefor will be made per share."

"3. No bid will be received unless the person offering to bid shall have deposited with the Alien Property Custodian or with Joseph F. Guffey, Director, Bureau of Sales, * * * as a pledge that he will make good his bid in case of its acceptance, a check for the sum of \$100,000, certified by some bank or trust company and payable to the order of said Director * * *"

"4. Such property will be sold only to an American citizen or citizens, or to a corporation incorporated within and under the authority of the laws of a state or territory of the United States or any of its insular possessions; but the Alien Property Custodian shall have the right to exclude from bidding at any such sale and/or from purchasing or otherwise acquiring the above described property, any corporation which he shall, after investigation, determine to be controlled, managed or operated, wholly or mainly, by or for the account or benefit of a person or persons not a citizen or citizens of the United States or of its insular possessions. The Alien Property Custodian or said Director of Bureau of Sales shall have the right to require, either before or after any bidding or acceptance of any bid, evidence that the bidder is qualified, as above

provided, to bid for and purchase said property."

"11. Further information concerning the property to be sold and concerning said Botany Worsted Mills may be had by application to said Joseph F. Guffey, Director of Sales, Alien Property Custodian * * *. No inspection of the plant will be allowed except upon written order from said Director of Sales, to be given only to those (a) who have qualified as bidders, or (b) who shall have deposited with said Director of Sales a certified check for \$25,000, said deposit to be returned upon the qualification of said person as a bidder, in the event such person shall so qualify; otherwise as soon as practicable after the sale."

"14. Said sale shall be made by the Alien Property Custodian by virtue of and subject to the provisions of the Act of Congress known as the 'Trading with the Enemy Act,' as amended, and the proclamations and executive orders issued in pursuance thereof, and particularly the executive order issued by the President of the United States on the 16th day of July, 1918, copies of which may be obtained by application to Joseph F. Guffey, Director of Sales, Alien Property Custodian * * *"
(Plaintiff's Exhibit 10, facing Rec., p. 204).

This exhibit also indicates the extent and character of the property of the Botany Worsted Mills.

The appellant protested against the proposed sale (*Rec., pp. 17, 18*). He also filed a claim pursuant to Section 9 of the Trading with the Enemy Act (*Rec., pp. 22-25*), and set forth that fact in a supplemental bill (*Rec. pp. 21, 22*). As a result of the filing of this claim the sale was stayed until final judgment herein.

Other material facts are set forth under the proper headings in the Points that follow.

The case was tried before the Honorable Learned Hand in the District Court of the United States for the Southern District of New York, who, on June 11, 1920, rendered judgment dismissing the original and supplemental bills of complaint herein upon the merits (*Rec.*, p. 319). An appeal was allowed to this Court from the decision so rendered (*Rec.*, pp. 320, 321), the appellant having assigned the errors set forth in the *Record at pages 321-324*), as follows:

Assignment of Errors.

I. The Court erred in holding that the Act of Congress known as "Trading with the Enemy Act," approved October 6th, 1917, and the amendments thereto approved March 28, 1918, and November 12, 1918, in so far as the same undertook to permit the seizure of the property of Stoehr & Sons, Inc., a New York corporation, ex parte and without affording to it a hearing or an opportunity to be heard and to confer upon the Alien Property Custodian the right to sell the property so seized without proceedings before a judicial tribunal, was constitutional.

II. The Court erred in refusing to hold that in so far as the Alien Property Custodian undertook ex parte and without a legal proceeding based upon notice and a hearing or an opportunity to be heard in court, to take possession of the shares of stock of the Botany Worsted Mills belonging to Stoehr & Sons, Inc., and to determine that such shares belonged to Kammgarnspinnerei Stoehr &

Co. Aktiengesellschaft, or to any other enemy, his action was null and void and in violation of the due process clause of the Constitution of the United States.

III. The Court erred in refusing to hold that any title that may have accrued to Stoehr & Sons, Inc., under the terms of the contract of February 20, 1917, was not divested by the passage of the "Trading with the Enemy Act," and in refusing to hold that in so far as said Act undertook to divest such title it constituted a deprivation of property without due process of law within the meaning of the due process clause of the Constitution of the United States.

IV. The Court erred in refusing to hold that the sale attempted by the Alien Property Custodian of the shares of stock of the Botany Worsted Mills claimed by Stoehr & Sons, Inc., a New York corporation, in the absence of a judgment in a proceeding duly instituted and conducted in accordance with due process, constituted a violation of the right of property of Stoehr & Sons, Inc., within the meaning of the due process clause of the Constitution of the United States.

V. The Court erred in holding that Stoehr & Sons, Inc., acquired no title to the 14,900 shares of stock of the Botany Worsted Mills described in the contract of February 20, 1917.

VI. The Court erred in holding that the shares of stock of the Botany Worsted Mills described in the contract of February 20, 1917, were not put

beyond the reach of capture by the execution of such contract.

VII. The Court erred in holding that the contract of February 20, 1917, did not constitute an executed sale but a mere option to purchase the 14,900 shares of stock of the Botany Worsted Mills which were the subject-matter of said contract.

VIII. The Court erred in holding that the contract of February 20, 1917, did not convey to Stoehr & Sons, Inc., the title to the 14,900 shares of stock of the Botany Worsted Mills therein described.

IX. The Court erred in not holding that by the terms of the agreement of February 20, 1917, Stoehr & Sons, Inc., acquired at least the equitable title to the 14,900 shares of the capital stock of the Botany Worsted Mills which are the subject-matter of that instrument.

X. The Court erred in not holding that the transfer of the title to the 14,900 shares of the capital stock of the Botany Worsted Mills to Stoehr & Sons, Inc., was accomplished on February 20, 1917, and that subsequent events did not invalidate such transfer.

XI. The Court erred in not holding that the equitable title to the 14,900 shares of the Botany Worsted Mills having passed to Stoehr & Sons, Inc., on February 20, 1917, the fact that the consideration was to be paid later and that the shares of stock pledged as collateral security were to be

redelivered from time to time as the instalments of the purchase price were paid, did not affect the title or render the contract executory or subject to dissolution upon the declaration of war.

XII. The Court erred in not holding that Stoehr & Sons, Inc., the owner of the 14,900 shares of stock of the Botany Worsted Mills, an American corporation, was not an enemy or ally of an enemy within the meaning of the "Trading with the Enemy Act," and that they were not therefore subject to capture or seizure under its terms, and that the act of the Alien Property Custodian in condemning them as enemy-owned property upon his determination that they were such was without jurisdiction and void.

XIII. The Court erred in not holding that the proposed sale by the Alien Property Custodian of the 14,900 shares of stock of the Botany Worsted Mills would constitute a violation of the true intent and meaning of the "Trading with the Enemy Act."

XIV. The Court erred in dismissing the bill of complaint for want of equity and in entering the final decree to that effect against the complainant.

XV. The Decree of the District Court in favor of the defendants is contrary to the law and the evidence in the case.

POINTS.

I.

By the terms of the agreement of February 20, 1917, Stoehr & Sons, Inc., the New York Company, acquired at least the equitable title to the 14,900 shares of the capital stock of the Botany Worsted Mills, prior to that date belonging to Kammgarnspinnerei Stoehr & Co., Aktiengesellschaft, the Leipzig Company, which are the subject-matter of that instrument.

These shares, at the time of the execution of this instrument, though beneficially owned by the Leipzig Company, stood in the names of Hans E. Stoehr and Max W. Stoehr, as trustees, upon the books of the Botany Worsted Mills, 10,000 shares in the name of Hans from February 15, 1915, and 4,900 shares in the name of Max from February 26, 1915. This is alleged as a fact in the answer of the Alien Property Custodian (*Rec. pp. 30, 32*). These shares were on February 20, 1917, transferred on the books of the Botany Worsted Mills from the names of the trustees into the name of Stoehr & Sons, Inc., concurrently with the execution of the contract of that date (*Rec. p. 36*). The stock certificates were, however, at the time in Germany, it being then impossible, owing to the practical blockade maintained by the Allies, to arrange for their transmission from Germany to the United States.

The appellees have contended and the Court below has decided that no rights were acquired by Stoehr & Sons, Inc., to these shares on the theory that the instrument of February 20, 1917, was a

mere executory contract or an option, and that under its terms no obligation whatsoever was incurred by Stoehr & Sons, Inc.

(1) A careful examination of this contract will demonstrate the error of these contentions and that it accomplished an actual sale involving mutual obligations.

It is termed an "Agreement" (*Rec. p. 14*). It describes the beneficial interest of the Leipzig Company. It recites that "the Leipzig Company is desirous of selling and said New York Company is desirous of purchasing said interest on the terms and conditions hereinafter set forth" (*Rec. p. 14*).

It recites the payment by Stoehr & Sons, Inc., to the Leipzig Company of \$5,000 on account of the purchase price of these shares of stock. The proof shows that a credit was given (*Rec. pp. 138, 172*) to the Leipzig Company for that amount. That was in legal effect payment of the amount so credited.

It is then set forth that in consideration of such payment and in further consideration "of the *mutual promises* of the parties as herein set forth, it is hereby agreed as follows:"

This element of mutuality, coupled with the use of the word "*agreed*," is important as indicating that the transaction was not unilateral, but bilateral, and that it involved not only agreements and covenants on the part of the Leipzig Company, but on the part of Stoehr & Sons, Inc., as well.

This proposition requires no elaboration. It is established by a wealth of authority.

Wells v. N. Y. Central R. Co., 24 N. Y. 181, 183.

Baldwin v. Humphrey, 44 N. Y. 609.

Payne v. New South Wales Coal & Intercolonial Steam Nav. Co., 10 Hurl. & G. 283, 291.

Barton v. McLean, 5 Hill, 256, 258.

Greene v. Creighton, 7 R. I. 8.

Thornton v. Kelly, 11 R. I. 498, 499.

Rohr v. Baker, 13 Oregon 350 (citing *Plowd.* 5).

Jones v. Williams, 139 Mo. 1, 77 L. R. A. 682.

Arnold v. Scharbauer, 116 Fed. Rep. 492, 497.

Leonard v. Marshall, 82 Fed. Rep. 396, 399.

Richardson v. Clements, 89 Pa. 503, 505.

Bingham v. Insurance Co., of N. A., 74 Wis. 498.

Moran v. Standard Oil Co., 211 N. Y. 187, 197.

In the case last cited Judge Cardozo said (the italics being those of the Court):

“The very word ‘agreement’ connotes a mutual obligation. (*Benedict v. Pincus*, 191 N. Y. 377, 383, 384.) There may be a ‘promise’ to serve without a promise to employ, but there can be no ‘agreement’ for service without mutuality of rights and duties. (*Richards v. Edick*, 17 Barb. 260, 263; *Baldwin v. Humphrey*, 44 N. Y. 609, 615.) ‘If it be agreed between A and B that B shall pay a sum of money for his lands, etc., on a particular day, those words amount to a covenant by A to convey the lands, for agreed, is the word of both.’ (*Pordage v. Cole*, 1 Saund. 3191, quoted in *Baldwin v. Humphrey*, (*supra*.) So, in *Richards v. Edick* (*supra*), where the cove-

nant read: 'The aforesaid party of the first part *agrees* to sell his farm in Florence, etc., to the party of the second part for and in consideration of seventeen hundred dollars,' the court held that the word 'agreement' necessarily imported two parties, one to sell and one to buy. 'It was not merely a *promise* made by one party to the other, but it was an *agreement* made by *both* and binding on *both* by every principle of law and morality applicable to the construction of contracts.' (*Richards v. Edick, supra.*)"

The First paragraph of the "agreement" thus made speaks in the present tense, *per verba de praesenti*. It does not refer to any future sale, assignment and transfer of these shares of stock or to an option to the New York Company to purchase them at any future time. On the contrary it proclaims in unequivocal vocal words a present sale (*Rec., p. 14*):

"The Leipzig Company *hereby sells, assigns and transfers* unto the New York Company all of its interest in said shares and said shares of stock shall be forthwith transferred upon the books of the Botany Worsted Mills and placed in the name of the said New York Company."

This constitutes a present sale, assignment and transfer. It is not an agreement to sell or an option to buy, but an actual executed sale. Before the New York Company entered into the contract its Board of Directors passed a resolution authorizing the purchase of the Leipzig Company in these shares (*Rec., p. 35*). Immediately after the contract was entered into the shares were as has been shown transferred on the books of the Botany Worsted Mills into the name of the New York Company (*Rec., p. 36*). Irrespective as to

whether or not these acts vested in the New York Company the legal title, it certainly conferred upon it the equitable title and ownership of these shares, assuming that the transaction was lawful at the time when it was made, as we shall presently show it to have been.

The Second paragraph provides (*Rec., p. 14*):

"The terms of the *sale* and the *purchase price* for said shares shall be determined as follows and paid in the following instalments."

Thereupon follow four subdivisions (a) (b) (c) and (d) which define the manner in which the *purchase price* is to be determined and how and when it shall be paid. The price is to be *payable* in five instalments, the first being *payable* in one year from the date of the contract and the subsequent instalments respectively in two, three, four and five years from said date; provision being in the meantime made for the apportionment of the dividends received by the New York Company on these shares until the terms of the contract are entirely carried out.

Nowhere in the instrument are to be found words creative of an option or indicative of a purpose to confer on the New York Company the right to elect whether it would take the shares or not.

(2) Before considering other features of this instrument, we shall direct our attention to the claim of the defendants that Stoeck & Sons, Inc., did not bind themselves to purchase or to pay for these shares and incurred no obligation whatsoever. That this contention is without merit, appears from the fact that the Second paragraph speaks not only of a "sale," but of "the purchase

price" of the shares, and that such purchase price "shall be * * * paid in the following installments." This is followed by the clauses stating when the installments of the purchase price are "payable."

The use of the word "payable" implies an obligation to pay.

Black's Law Dictionary, p. 180.

22 Am. & Eng. Enc. Law, 3d ed., p. 510.

If this language coupled with the repeated use of the word "agreed" does not create an obligation to pay the amount of such purchase price ascertained in the manner specified, these words would be without meaning. That full effect to all that is expressed and implied in them must be given is required by the most elementary of the canons of interpretation.

This is especially true in view of the fact that the instrument is called an "agreement" that it declares, in its introductory clause, that "it is hereby agreed," and that the execution of the instrument was immediately followed by action on the part of Stoehr & Sons, Inc., to perfect the sale and the transfer of the shares as agreed upon, by causing a transfer of them to be made to it upon the books of the Botany Worsted Mills.

Here, again, the authorities are clear that the agreement created an obligation on the part of the New York Company to pay the purchase price of the shares in the manner specified.

In *Booth v. Cleveland Rolling Mill Co.*, 74 N. Y. 15, Judge Allen, in language which has become classic, said:

"There is no particular formula of words, or technical phraseology, necessary to the

creation of an express obligation to do, or forbear to do, a particular thing or perform a specified act. If, from the text of an agreement, and the language of the parties either in the body of the instrument or in the recital or references, there is manifested a clear intention that the parties shall do certain acts, courts will infer a covenant in the case of a sealed instrument, or a promise if the instrument is unsealed, for non-performance of which an action of covenant or assumpsit will lie. * * *

The agreement which is the foundation of this action was drawn without as much regard to form as to substance, and the parties were content to give expression to their general intent, without studying accuracy or fitness of expression in detail, or setting forth the positive obligations with technical precision. The agreement as reduced to writing is not unilateral, but mutual in its character and obligations. * * *

It was in terms declared to be a memorandum of the agreement between the plaintiffs of the one part, and the defendants of the other, and each became parties to it, and bound by its terms by their signatures. The memorandum of the agreement is slightly informal in this, that by it the parties have not in technical language assumed the obligations and promised in *totidem verbis* to perform the stipulations of the agreement as recited and set forth in the paper writing, but the parties have in stating their respective obligations, and the stipulations to be performed by each, employed language fully the equivalent of an express promise, and quite as expressive of an absolute and personal obligation to perform the stipulations, and clearly manifesting not only an intent to promise, but an actual promise."

In the present case the instrument is not only described as "an agreement" between the parties,

but it recites that the Leipzig Company is desirous of selling and the New York Company is desirous of purchasing the beneficial interest of the Leipzig Company in the shares of stock of the Botany Worsted Mills then standing in the names of Hans E. Stoeck and Max W. Stoeck. Coupled with the terms of the First and Second paragraphs of the instrument which we have quoted, it is impossible to escape the conclusion that there was an obligation on the part of Stoeck & Sons, Inc., to purchase and to pay for the shares correlative with the actual sale, assignment and transfer by the Leipzig Company of the shares upon the terms set forth in the agreement.

The case just cited has been followed frequently, among others in

Jones v. Kent, 80 N. Y. 588.

New England Iron Co. v. Gilbert Elevated Ry. Co., 91 N. Y. 165.

Patterson v. Guardian Trust Co., 144 App. Div. 866.

Commercial Wood Co. v. Northampton Portland Cement Co., 115 App. Div. 293.

Horton v. Hall Mfg. Co., 94 App. Div. 407.

Matter of White Plains Water Commrs., 71 App. Div. 550.

Creamer v. Metropolitan Securities Co., 120 App. Div. 422.

Genet v. D. & H. Canal Co., 136 N. Y. 593.

See also

Butler v. Thompson, 92 U. S. 412.

In the recent case of *Grossman v. Schesker*, 206 N. Y. 466, it was held that a mutual agreement implies an offer and acceptance or a promise in some form, and where it has been mutually agreed that the defendant would pay to the plaintiff a sum named for "superintendence" of certain work, that there was not only an express promise by the defendant to pay, but also an implied promise by the plaintiff to superintend. The words of Judge Vann are important:

"A contract includes not only what the parties said but also what is necessarily to be implied from what they said. (*Milliken v. Western Union Tel. Co.*, 110 N. Y. 403, 408.) Thus the words 'cash on delivery' with no other promise to pay 'imply a promise and create an obligation' to make payment upon delivery. (*Justice v. Lang*, 42 N. Y. 493.) So the word 'sold' in a written agreement implies not only a contract to sell but also a contract to buy (*Butler v. Thomson*, 92 U. S. 412, 414); and a contract to buy with no express promise to sell implies the latter obligation. (*Hudson Canal Co. v. Penn. Coal Co.*, 8 Wall. 276, 289.) 'What is implied in an express contract is as much a part of it as what is expressed' (*Bishop on Contracts*, 3d ed., §241); for 'the law is a silent factor in every contract' (*Long v. Straus*, 107 Ind. 94, 95)."

So in *Simon v. Elgen*, 213 N. Y. 589, defendant's testator agreed to pay plaintiff's assignor whatever sum the decedent might realize on the sale of certain real estate over and above a sum named, the sum to be paid in no event to exceed a certain amount. The property remained unsold for a period of eight years. The plaintiff claimed that this constituted a breach of the con-

tract. It was held that, although there was no express agreement on the part of the decedent to sell under the contract, there was nevertheless created an implied duty to sell within a reasonable time, and that a failure to sell after reasonable opportunities had arisen gave rise to a cause of action. Judge Werner cited approvingly the felicitous expressions of Judge Finch in *Genet v. D. & H. Canal Co.*, *supra*, with regard to the implication of obligations under similar circumstances:

“They always exist where equity and justice require the party to do or to refrain from doing the thing in question; where the covenant on one side involves some corresponding obligation on the other; where by the relations of the parties and the subject-matter of the contract a duty is owing by one not expressly bound by the contract to the other party in reference to the subject of it.”

(3) Comment has been made by the appellees upon the terms of the Third paragraph (*Rec.*, p. 15), which provides that the certificates of stock for the 14,900 shares “*sold and transferred as hereinbefore provided*,” were to be placed in possession of the Leipzig Company “as collateral security for the amount of the purchase price,” and that as each annual installment with the additions for dividends received by the New York Company provided for in paragraph Second, subdivision (d) was paid, the New York Company “shall have the right to require the *redelivery* of, and the Leipzig Company will contemporaneously with the payment of each installment *redeliver* to the New York Company, one-fifth of said shares and thereupon the Leipzig Company shall continue to retain the remaining shares as collateral

security for the balance of the purchase price still payable." From this language is sought to be deduced an argument that no actual sale was intended, and in this connection the Fourth and Fifth paragraphs are also referred to in support of the claim.

This contention is, however, without merit. It having been provided in the earlier part of the instrument that the shares were *sold, assigned and transferred* to the New York Company and that the purchase price was to be paid in instalments over a period of five years according to the book value of the shares at the time when the several instalments were paid, it was but natural that the Leipzig Company should receive these shares, in pledge, "as collateral security for the amount of the purchase price." Had no security been given to the Leipzig Company that fact would have aroused suspicion. The giving of such security is an every-day transaction. The fact that the New York Company had the right to require the shares so held as collateral to be deposited with a bank or trust company to be selected by the Leipzig Company, until the purchase price or the balance remaining unpaid should have been fully paid, was likewise the adoption of a normal method for the protection of vendor and vendee alike. The provision that upon the payment of each instalment the Leipzig Company should, contemporaneously with the payment, "*redeliver*" to the New York Company one-fifth of the shares, was equally appropriate and did no more than to give expression to what would be justly called for under the circumstances. In the absence of such a provision the Leipzig Company might have insisted upon holding as collateral all of the shares

until the entire purchase price had been paid. It was, therefore, but natural that the New York Company should have returned to it a proportionate part of the collateral pledged as security for the payment of the purchase price. The omission of such a provision would have been impugned by the appellees.

(4) The contention that the Fifth paragraph is inconsistent with an executed sale is without foundation. It merely provides against the contingency that the New York Company might fail to pay some of the annual instalments when due. In that event it is provided, in the usual form, that the Leipzig Company shall notify the New York Company, in writing, that it requires the payment of the instalment then due, together with the additions, whereupon, "in the event that the New York Company shall not within sixty days after such demand pay the instalment with the additions, *then* the shares of stock or any remaining balance of it shall be forthwith *retransferred* to the Leipzig Company on the books of the Botany Worsted Mills, and all rights of the New York Company to said stock or any such balance shall cease and the Leipzig Company shall retain the \$5,000 paid on account * * * in full settlement of any claim against the New York Company and therefore neither of the companies shall have any further claim against the other arising under or by reason of the agreement" (*Rec.*, p. 16).

It is to be noted in this connection that the \$5,000 paid on the execution of the instrument by the New York Company was declared to be paid on account of the last or fifth instalment (*Rec.*, p. 15). It was further expressly "understood that

the non-payment of any subsequent instalment shall not affect the portion or portions of the stock which may have been fully paid for by a previous instalment or instalments" (*Rec.*, p. 16).

How such a provision can be regarded as depriving the transaction of the character of a sale, it is difficult to understand. The use of the words "redeliver" and "retransfer" betoken a previous delivery and transfer, and a recognition of the fact that the parties intended that the transaction should constitute an executed sale, and not merely an executory contract or an option.

It is further to be observed that the Fifth paragraph does not, as has been claimed by the appellees, provide that the contract may be terminated at the option of *either* party; nor does it permit the New York Company to accomplish that result by forfeiting the \$5,000 paid at the time of the execution of the contract. It is *only* in the event that any of the annual instalments with the additions represented by dividends declared, shall not be paid when due, that the *Leipzig Company acquires the right to a retransfer of the shares of stock, provided it gives the notice required and the New York Company shall then fail to pay the instalment that has matured*. It is only in that contingency that the claims of the respective companies against each other growing out of the agreement are to cease. In the absence of a demand and notice by the Leipzig Company (and there has been none), the New York Company continues to be liable for the unpaid portion of the purchase price. It is not enabled of its own volition to discharge itself from liability. It is only in the event that the Leipzig Company elects to pursue the remedy provided for in the Fifth

paragraph that the New York Company would be absolved from further liability. The suggestion, therefore, that this instrument merely confers an option upon the New York Company either to purchase the shares of stock or to refrain from purchasing them, as it may elect, is founded on a palpable misconception of the terms of the agreement. We repeat, that neither the word "option" nor anything that connotes it is to be found within the four corners of the document.

The words of Judge Andrews in *Wing v. Ansonia Clock Co.*, 102 N. Y. 534, 535, are most pertinent:

"A mere right of forfeiture attached to a contract, is, of course, no answer to an action on a covenant of payment, or other covenant of the defaulting party. The forfeiture may be waived and the remedy is alternative and not exclusive."

In all of its phases this case comes directly within the decisions of this Court in *Stewart v. Griffith*, 217 U. S. 323, and *Western Union Telegraph Co. v. Brown*, 253 U. S. 101.

In *Stewart v. Griffith*, 217 U. S. 323, the point in controversy was as to whether an instrument relating to the sale of real estate was an absolute contract of sale or merely an option to purchase. The instrument, after reciting the payment of \$500 part purchase price of the total sum to be paid for the tract of land, provided that Griffith, as the agent of Ball, "hereby grants, bargains and sells, and agrees to convey by proper deed * * * duly executed by the said Ball to the said Stewart, the said two hundred and forty acres of land upon further payments and conditions hereinafter named, to wit: The balance of one-half of the

purchase price of the said two hundred and forty acres, more or less, at the rate of forty dollars per acre is to be paid to the party of the first part on the 7th day of November, 1903, and the remaining one-half of the total purchase price is to be divided into five equal payments secured by five promissory mortgage notes, secured by purchase money mortgage upon the said property to be given by the said Stewart and wife. * * *

In case the remainder of the first half of the purchase price be not paid on November 7, 1903, then the said \$500 so paid to the said Griffith is to be forfeited and the contract of sale and conveyance to be null and void, and of no effect in law, otherwise to be and remain in full force. * * *

The possessory right to all of the said premises on the property mentioned herein is to remain in the said Ball until the one-half payment of the total purchase price herein provided for on November 7, 1903, has been fully paid and satisfied to the said L. A. Griffith agent."

It was adjudged that this instrument was not an option, but an absolute contract, Mr. Justice Holmes saying:

"But in this case we are not confined to a mere implication of a promise from the penalty. The tenor of the 'agreement' throughout imports mutual undertakings. The \$500 is paid as 'part purchase price of the total sum to be paid,' that is, that the purchaser agrees to pay. The land is described as 'being sold.' There are words of present conveyance inoperative as such but implying a concluded bargain, like the word 'sold' just quoted. So one-half of the purchase price 'is to be' and the notes secured by mortgage 'to be given'; and in the case of the burial lot Ball 'shall have paid to him' \$40 if he elects to

abandon it. * * * We are satisfied that Stewart bound himself to take the land. See *Wilcoxson v. Stitt*, 65 Cal. 596; *Dana v. St. Paul Investment Co.*, 42 Minn. 194. The condition plainly is for the benefit of the vendor and hardly less plainly for his benefit alone, except so far as it may have fixed a time when Stewart might have called for performance if he had chosen to do so, which he did not. This being so, the word void means voidable at the vendor's election and the condition may be insisted upon or waived at his choice."

This case was followed in *Western Union Telegraph Co. v. Brown*, 253 U. S. 101. In the instrument there involved it was stipulated that Pitt and Campbell agreed to sell and deliver to Hastings and Lange, who agreed to buy, take and receive from them 625,000 shares of the Kennedy Consolidated Gold Mining Company, upon the following terms and conditions: First—The total price to be paid for the shares of stock to be \$75,000 * * * payable \$7,500 on the execution of the agreement; \$11,250 on or before the 1st day of May, 1907; and the like sum on or before the 5th of July, 1907, the 5th of September, 1907, the 5th of November, 1907, the 5th of January, 1908, and the 5th of March, 1908. It was agreed that immediately upon the payment of the first-named sum Pitt and Campbell would deposit in escrow in and with the Lyon County Bank, of Yerington, Nevada, certificates of stock endorsed in blank representing in the aggregate 625,000 shares of the capital stock of the mining company, and would thereupon enter into an escrow agreement with Hastings and Lange and the bank, under which agreement the bank should hold the shares of stock

to be delivered to Hastings and Lange upon the payment by them of the final sum provided for, and the bank was constituted the agent of Pitt and Campbell for the purpose of receiving the payments under the agreement, and it was further agreed that in the event of default by Hastings and Lange the bank should be authorized under the terms of such deposit in escrow to deliver all the shares of stock so deposited with it to Pitt and Campbell, and all payments theretofore made by Hastings and Lange should be forfeited to Pitt and Campbell, and that thereupon all rights of each of the parties should forever cease and terminate.

On these facts the Circuit Court of Appeals decided (248 *Fed. Rep.* 656) that the contract was an option terminable by the act of the buyer in failing to make the payment on the contract. This Court was of a contrary opinion, viewing the contract as an absolute sale, Mr. Justice Day saying:

“An option is a privilege given by the owner of property to another to buy the property at his election. It secures the privilege to buy and is not of itself a purchase. The owner does not sell his property; he gives to another the right to buy at his election.

“What then is the nature of this agreement? It contains the positive undertaking of the owner to sell and the purchaser to buy 625,000 shares of stock upon terms which are named. Upon the first payment being made the certificates are to be deposited with the bank in escrow, to be delivered when the final payment agreed upon is made, and in the event of default in payment the bank is authorized to deliver the shares of stock to Pitt and Campbell, and all payments are to

be forfeited, and the rights of the parties to cease and determine. We are of opinion that this is far more than a mere option to purchase terminable at the will of the purchaser upon failure to make the payments required. The agreement contains positive provisions binding the owner to sell and the purchaser to buy upon the terms of the instrument. It is true the stock is to be deposited with the bank in escrow, and it is authorized to deliver the same to Pitt and Campbell upon default in payment. The findings do not show whether Pitt and Campbell took back the stock upon default of subsequent payments. There was no understanding that Pitt and Campbell should take back the stock when the payments were not made, and no agreement would put it in the power of the purchasers to relieve themselves of the obligations of their contract by failing to keep up the payments. The right of Pitt and Campbell to receive the stock from the bank and end the contract was stipulated; it was a provision inserted for their benefit, of which they might avail themselves at their election.

"In our opinion *Stewart v. Griffith*, 217 U. S. 323, is controlling upon this point. * * * The condition in the contract in *Stewart v. Griffith* that non-payment should render the contract null and void is the equivalent of the stipulation in the present agreement, much relied upon by the respondents, that upon non-payment of the stipulated sums the rights of each of said parties shall cease and determine. We think the attempted distinction between *Stewart v. Griffith* and the instant case is untenable. * * * The fact that the contract contains a privilege of ending it at the election of the vendor for non-payment of the sum stipulated does not convert it into an option terminable by the purchasers at their will."

The concluding paragraph quoted from the opinion of Mr. Justice Day might have been written with equal effectiveness of Paragraph Fifth now under consideration.

There is nothing in the decisions in *The Elgee Cotton Cases*, 22 Wall. 180 and *French v. Hay*, 22 Wall. 231, relied on by the appellees, that weakens our position. In both of these cases the contracts were unquestionably executory. Although, in the first of them, the vendors stated in the contract that they had sold unto the vendee their crops of cotton, the manifest intention, shown not only in the instrument but by the acts of the parties, was that title to the cotton was not to pass until it had been weighed, delivered and paid for by the vendee. The contract was a cash contract. No credit was intended. A part of the cotton was not in a deliverable state. No steps were ever taken to consummate the sale although the cotton was not seized until nine months after the making of the contract.

In the second of these cases the alleged agreement of transfer of the choses in action showed upon its face that the assignment was made conditioned "upon his (the transferees) payment to me (the assignor) of the above-named sum of \$5,000 with interest from this date." It was accompanied by a power of attorney from the assignor to the alleged transferees, which was inconsistent with the theory of an executed sale and the divesting of the assignor's title. No part of the \$5,000 was ever paid. Mr. Justice Strong said:

"That instrument, however, called an assignment, was at most but an executory agreement to assign. Construed with the power

of attorney made at the same time it admits of no other construction. The instrument was signed by Hay alone. French, the plaintiff, did not sign it, and it is not averred that he promised to pay the \$5,000. Hay undertook only that French should hold the judgments and claims 'upon his payment' of the stipulated consideration with interest from the date. And the power of attorney given by Hay to French at the same time was an authority to deal with the securities in the name of Hay and for Hay. * * * The transmission of the title and the payment of the price were intended to be contemporaneous."

(5) Nor is there any warrant for the assertion that a failure to observe literally the provisions of the by-laws of the Botany Worsted Mills with respect to the transfer of these shares of stock on its books, made ineffectual the attempt of the parties to accomplish the immediate transfer of even the beneficial ownership of these shares of stock to Stoehr & Sons, Inc.

The Botany Worsted Mills is a New Jersey Corporation. Under the laws of that State shares of stock constitute personal property. Certificates of stock, as was held in *Mechanics Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 627, are simply muniments and evidence of the holder's title to a certain number of shares in the property and franchises of the corporation of which he is a member.

This idea was accepted in *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1, where Mr. Justice Harlan said:

"The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company

for the benefit of the true owner. As the habitation and domicile of the company is and must be in the State that created it, the property represented by its certificates of stock may be deemed to be held by the company within the State whose creature it is, whenever it is sought by suit to determine who is its real owner."

The mere possession of a certificate of stock or its transfer on the books of the corporation insuring it does not, therefore, determine the title, certainly not the equitable title.

Since a certificate of stock is not the stock itself, but merely written evidence of the ownership thereof and of the rights and liabilities resulting from such ownership, an owner of shares may as between himself and the transferee transfer his ownership or beneficial interest without a delivery of the certificates, a mere assignment or sale being sufficient.

Pendry v. Carleton, 87 Fed. Rep. 41.

Brigham v. Mead, 10 Allen, 245.

Lipscomb v. Condon, 56 W. Va. 416; 67 L. R. A. 670.

Francis v. N. Y. El. Ry. Co., 17 Abb. N. C. 1; *affd.* 108 N. Y. 93.

Scripture v. Francistown Soapstone Co., 50 N. H. 571.

In the last of these cases the Court said:

"The ownership of the shares passes from the seller to the buyer by force of the contract of sale and not by operation of law; and if that be so the buyer's title, so far as the seller is concerned attaches the moment this contract is fully consummated between them."

In *Black v. Zacharie*, 3 How., U. S., 483, it was recognized that even though the legal title to stock might not pass under a general assignment of property until the transfer is completed in the mode pointed out by the laws of the State where the corporation is organized, the equitable title will pass if the assignment of equitable interests in stock is not prohibited under the law of such State. Mr. Justice Story said:

"The question is not here, whether the legal interest in the stock passed by the assignment before a transfer of the stock upon the books of the corporations; but whether the equitable interest therein, as contradistinguished from the legal interest, did not pass to and vest in the assignee by the law of Louisiana, so as to oust the right of any creditor with full notice of the assignment from divesting the title of the assignee by a subsequent attachment thereof as the property of the debtor. * * * Out of Louisiana, we believe that no such question could possibly arise; for courts of law, as well as courts of equity, are constantly, in all States where the common law prevails, in the habit of holding a prior assignment of the equitable interest in stock as superseding the rights of attaching creditors, who attach the same with a full knowledge of the assignment."

In *Grymes v. Howe*, 49 N. Y. 17, a gift mortis causa of shares of stock was held to confer the equitable title, where the donor made an absolute assignment of it to the plaintiff, which he handed to his wife to be delivered to the plaintiff upon his death. Judge Peckham said:

"The equitable title to the stock was thus passed by the assignment and it was not necessary to hand over the certificate."

In *Johnson v. Underhill*, 52 N. Y. 303, it was held that the provisions of an act declaring that no transfer of stock should be valid for any purpose whatever until it shall have been entered in the book prescribed, did not affect, as between a vendor and vendee, the validity of an assignment in reality made, although the stock was not transferred in legal form. In the course of his opinion Judge Folger said:

"For we are of the opinion that, under the operation of this twenty-fifth section, when the appellant sold and assigned the stock, his transferee assumed a position to the appellant analogous to that of a principal to his surety, or of a *cestui que trust* to his trustee. Ordinarily, when the holder of stock sells it, and delivers to the vendee the certificate therefor, with an executed power of attorney to transfer upon the books of the company, the vendee becomes the owner of all title, legal and equitable, thereto. (*McNeil v. Tenth National Bank*, 46 N. Y. 325.) But until the transfer upon the books is in fact made, the vendor is still the nominal owner; and he is, while such, to be treated as the trustee of the stock for his vendee. (*Commercial Bank of Buffalo v. Kortright*, 20 Wend. 91; and 22 id. 348.)"

See also,

Harvey v. Stowe, 219 Fed. Rep. 22; *affd.*
241 U. S. 199.

Chemical National Bank v. Colwell, 132
N. Y. 250.

*Robinson v. National Bank of New
Berne*, 95 N. Y. 642.

Travis v. Knox Terpezone Co., 215 N. Y.
259, 264.

Matter of Ringler, 145 App. Div. 375.

Such is also the law of New Jersey.

Broadway Bank v. McElrath, 13 N. J. Eq. 24, *affd. sub. nom. Hunterdon County Bank v. Nassau Bank*, 17 N. J. Eq. 496.

“The requirement of a registry exists only for the protection and convenience of the corporation issuing the shares of stock.”

See cases above cited.

In *Locke v. Farmers Loan & Trust Co.*, 140 N. Y. 135, a holder of corporate stock executed a declaration of trust in it and retained possession of the stock. It was held that the equitable title passed to the beneficiary, Judge Finch saying:

“No beneficial interest in the property was left in himself, but the whole of that interest was by his own act vested elsewhere. He held the legal title to the stock, but necessarily held it, from the date of his declaration, as trustee for the beneficiaries. There was no formal transfer on the books of the company for himself as an individual to himself as trustee, and he remained the nominal owner, holding the naked and barren legal title. In such a case, as between a vendor and vendee of stocks, the vendor holds the legal title as trustee for the vendee, because the former, having parted with the entire beneficial interest, can hold the legal title in no other way.”

It has likewise been held that the transfer of stock can be accomplished by a mere entry on the books of the company.

American National Bank v. Oriental Mills, 17 R. I. 551, 23 Atl. Rep. 795.

Here there was such a transfer concurrently with the execution of the instrument of February 20, 1917.

(6) In reply to the contention that the certificates of stock were not actually delivered to the New York Company, but remained in Germany, and that therefore no title passed, we refer to the decision in *Briggs v. United States*, 143 U. S. 346. It involved the right of the owner of cotton growing on plantations in Mississippi and seized by the forces of the United States during the Civil War, to recover the proceeds from the Government. The bill of sale for the cotton read: "I hereby sell and transfer to said C. M. Briggs all the cotton on my two plantations in Mississippi, near Egg's Point and Greenville. Said cotton so sold embraces all that I may have, baled and unbaled, gathered and ungathered." It was held that title to the cotton passed as between the vendor and vendee without actual delivery. Mr. Justice Field, after reviewing the authorities, said:

"The delivery of the crops was not essential to pass title as between Morehead and Briggs. The law on the subject of the sale of personal property does not require impossibilities, as would be a delivery in a case of that kind. The cotton was not at the time grown, and even if the sale be deemed incomplete until the actual appearance of the crop, it could not then be removed from the soil for delivery; besides, it was within the limits of a recognized enemy's country, and any attempt to transport it to the Union side for delivery would have been unlawful. By the common law a sale of personal property is complete and the title passes as between ven-

dor and vendee when the terms of transfer are agreed upon, without actual delivery."

See also,

Simmons v. Swift, 5 B. & C. 857, 862.

Gilmour v. Supple, 11 Moore P. C. 551, 566.

Willis v. Willis, 6 Dana (Ky.) 48.

II.

The transfer of the title to these shares to Stoehr & Sons, Inc., the New York Company was accomplished on February 20, 1917, before there had been any declaration of war between the United States and Germany, and at a time when such transfer was entirely legal. The subsequent declaration of war, and the passage of the Trading with the Enemy Act did not invalidate such transfer or divest the transferee's title.

While it may be assumed for the purposes of this case, that, after war has been declared, contracts between citizens of the belligerent states may under some conditions be illegal, yet it has never been held that a contract, made prior to the declaration of war, which relates merely to the transfer of the title to property between the citizens of states subsequently becoming belligerents possesses any element of illegality. In fact the treaty between Prussia and the United States, which was in full force at the time of the declaration of war, contained provisions to the effect that, in the event of war, it would be lawful for the citi-

zens of the high contracting parties, for a period specified in the treaty, to remove their property from the enemy jurisdiction.

There is no principle of international law, of the common law or of statute law, which would have prevented a German subject at any time prior to April 6, 1917, from conveying to an American citizen or which would have forbidden the latter from accepting a conveyance of real property belonging to the former, or which would have prohibited the purchase by an American citizen from a German subject of chattels or choses in action at that time. The mere fact that there had occurred an interruption of diplomatic relations and that there was a likelihood that war would follow, did not change the status as to each other of the citizens of the United States and the subjects of Germany. They had not become enemies and had not lost the right to contract with one another. The very fact that a period of more than two months elapsed between the severance of diplomatic relations and the declaration of war indicated that it was still hoped, and possibly expected, that war might be averted. In the interval, as was conceded by appellees' counsel on the argument below, transactions of huge extent were carried on between the two countries, money was transmitted to and received by their respective banks, and extensive communications by the wireless telegraph took place between merchants and bankers of these countries, without let or hindrance.

It has been argued that, on the outbreak of the war, the contract was dissolved and became impossible of performance. That assumes that the transaction was merely an executory contract. It did not, however, partake of that character. It was executed to the extent of passing at least the

equitable title and ownership of the shares of stock which were the subject-matter of the contract. If the subject-matter of this contract had been real property and a deed had been executed which conveyed either the legal or the equitable title, and the grantee had given a mortgage or other security for the payment of the purchase price, the situation would have been the same as in the present case—while the title to the subject-matter of the contract had passed, the consideration was still to be paid. That did not, however, dissolve the executed contract. At the most it merely prevented the vendee from paying the purchase price to the subject of the enemy state until the end of the war, and in the meantime our Government by proper legislation and proceedings thereunder, might have enabled to require the vendee to pay the consideration in accordance with the terms of the contract to its duly designated officials.

Appellees' counsel have treated the case as though the New York Company had merely secured a right to maintain an action for specific performance. That is not the case. That corporation had become the equitable owner of the shares of stock. Although the equitable title had passed out of the Leipzig Company, the legal title to the shares was vested in Hans E. Stoehr and Max W. Stoehr as trustees and they as such trustees had transferred the share to the New York Company. There was, therefore, no occasion for bringing a suit for specific performance.

But even if there were, our courts would not have withheld relief against a defendant enemy, and under the principle decided in *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1, such an action might have been brought in our courts. In

fact a suit for specific performance was, under similar circumstances, held maintainable in *Compagnie Universelle de Telegraphie et de Telephonie Sans Fil v. United States Service Corporation*, 95 Atl. Rep. 187, affirmed by the New Jersey Court of Errors and Appeals in 96 Atl. Rep. 292.

It is true that the case just cited arose between a French corporation and a German corporation and that at the time when the action was brought we were not at war with Germany. Nevertheless it is clear that, even if the suit had been instituted by an American corporation after the war, the same reasons which prompted the Court to exercise jurisdiction in that case would have been applicable to a similar controversy arising after the United States had entered the war.

In this connection it is also important to observe, that not only was this contract executed at a time when we were still at peace with Germany, but there was nothing in our jurisprudence which contemplated that these shares of stock should, on the outbreak of the war, be seized by our Government as enemy property, even in the absence of the contract of February 20, 1917. Nor was there any legislation looking to the seizure of enemy owned property of this character having its situs in the United States until the enactment of the Trading with the Enemy Act on October 6, 1917, exactly six months after the declaration of war.

This is significant because of the doctrine laid down in the leading case of *Brown v. United States*, 8 Cranch, 109, where it was held that British property found in the United States on land at the commencement of hostilities with Great Britain in 1812, could not be condemned as enemy property without a legislative act authorizing its

confiscation, and that the act of Congress declaring war was not such an act. Chief Justice Marshall said:

“The war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court.

The questions to be decided by the court are: 1st. May enemy's property, found on land at the commencement of hostilities, be seized and condemned as a necessary consequence of the declaration of war? 2d. Is there any legislative act which authorizes such seizure and condemnation?

Since, in this country, from the structure of our government, proceedings to condemn the property of an enemy, found within our territory at the declaration of war, can be sustained only upon the principle that they are instituted in execution of some existing law, we are led to ask—Is the declaration of war such a law? Does that declaration, by its own operation, so vest the property of the enemy in the government, as to support proceedings for its seizure and confiscation, or does it vest only a right, the assertion of which depends on the will of the sovereign power?

The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an abso-

lute confiscation of this property, but simply confers the right of confiscation. Between debts contracted under the faith of laws, and property acquired in the course of trade, on the faith of the same laws, reason draws no distinction; and although, in practice, vessels, with their cargoes, found in port, at the declaration of war, may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace, in the course of trade. Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war. But although the practice in this respect may not be uniform, that circumstance does not essentially affect the question. The inquiry is, whether such property vests in the sovereign, by the mere declaration of war, or remains subject to a right of confiscation, the exercise of which depends on the national will; and the rule which applies to one case, so far as respects the operation of a declaration of war on the thing itself, must apply to all others over which war gives an equal right. The right of the sovereign to confiscate debts being precisely the same with the right to confiscate other property found in the country, the operation of a declaration of war on debts and on other property found within the country must be the same. * * *

The modern rule, then, would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty, an article is inserted stipulating for the right to withdraw such property. This rule appears to be totally incompatible with the idea, that war does of itself vest the property in the belligerent government. It may be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate the property of the enemy; and their rules go to

the exercise of this right. * * * That the declaration of war has only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results, such as a transfer of property, which are usually produced by ulterior measures of government, is fairly deducible from the enumeration of powers which accompanies that of declaring war. 'Congress shall have power' 'to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.' It would be restraining this clause within narrower limits than the words themselves import, to say, that the power to make rules concerning captures on land and water is to be confined to captures which are extra-territorial. If it extends to rules respecting enemy property found within the territory, then we perceive an express grant to Congress of the power in question, as an independent substantive power, not included in that of declaring war. * * * Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property, in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary. It appears to the court, that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war."

The doctrine of this case has never been questioned, and conforms with humane traditions of which we have hitherto been justly proud.

See also,

Conrad v. Waples, 96 U. S. 284.

U. S. v. 1756 Shares of Stock, 5 Blatchf. 237.

Britton v. Butler, 9 Blatchf. 462.

U. S. v. Bales of Cotton, Woolw. 262.

McVeigh v. Bank, 26 Grattan 200.

Consequently, even had there been a certainty that war between the United States and Germany would presently occur, it was in no way illegal to enter into such a contract as that which we are now considering. In view of the attitude of our Government from August 1, 1914, through all of the weary months of the great European war, it was reasonable to believe that, if we should become embroiled in that conflict, we would not depart from the considerations which underlie the opinion of the great Chief Justice in *Brown v. United States*, *supra*. To say, therefore, as appellees have contended, that this contract was made for the purpose of defeating the United States of its belligerent rights, is in total disregard of this accepted doctrine. This is especially true when one bears in mind that the consideration to be paid for the shares of stock purchased from the Leipzig Company was not removed out of the jurisdiction of our Government and remained subject to capture in the event that Congress should eventually determine that enemy property within the territory of the United States might be seized.

III.

The contention that the sale of these shares of stock was merely colorable and that the contract was intended as a fraud upon our Government, is without merit.

In determining the *bona fides* of the contract of sale as between the parties thereto and our Government, it is important to take into account the state of the law, as understood at the time when the contract was entered into, with respect to the effect of a possible war on privately-owned property within our jurisdiction.

Attention has already been directed to the opinion of Chief Justice Marshall in *Brown v. United States*, 8 Cranch, 109. Contemporaneously with that decision Chief Justice Kent in *Clarke v. Morrey*, 10 Johns, 68, 72, learnedly discussed the subject from the historic standpoint:

"The rigour of the old rules of war no longer exists, as *Bynkershoek* admits, when wars are carried on with the moderation that the influence of commerce inspires. It may be said of commerce, as *Ovid* said of the liberal arts: *Emollit mores, nec sinit esse feros*.

"We all recollect the enlightened and humane provision of *Magna Charta* (c. 30) on this subject; and in France the ordinance of Charles V. as early as 1370, was dictated with the same magnanimity; for it declared that in case of war, foreign merchants had nothing to fear, for they might depart freely with their effects, and if they happened to die in France, their goods should descend to their heirs. (*Henault's Abrege Chron. tom.1. 338.*) So all the judges of England resolved, as early as the time of Henry VIII that if an

alien came to England, before the declaration of war, neither his person, nor his effects, should be seized in consequence of it. (*Bro. tit. Property, pl. 38, Jack. Cent. 201, Case 22.*) And it has not become the sense and practice of nations, and may be regarded as the *public law of Europe*, (the anomalous and awful case of the present violent power on the continent excepted,) that the subjects of the enemy, (without confirming the rule to merchants,) so long as they are permitted to remain in the country, are to be protected in their persons and property, and to be allowed to sue as well as to be sued. (*Bynk. Quaest. Jur. Pub. b. 1. c. 7. c. 25. s. 8.*) It is even held, that if they are ordered away, in consequence of the war, they are still entitled to leave a power of attorney, and to collect their debts by suit. (*Emerigon, Traite des Assurances, tom. 1. 567.*)

“Modern treaties have usually made provision for the ease of aliens found in the country, at the declaration of war, and have allowed them a reasonable time to collect their effects and remove. *Bynkershoek* gives instances of such treaties, existing above two centuries ago; and for a century past, such a provision has become an established formula in the commercial treaties. *Emerigon*, who has examined this subject with the most liberal and enlightened views, considers these treaties as an affirmation of common right, or the public law of Europe, and the general rule is so laid down by the later publicists, in conformity with this provision. (*Vattel, b. 3. c. 4. s. 63, Le Droit Public de L'Europe, par Mably. Oeuvres, tom. 334.*) Some of these treaties have provided that foreign subjects should be permitted to remain and continue their business, notwithstanding a rupture between the governments, so long as they behave peaceably; (Treaty of Commerce between Great Britain and France, in 1786, and

of Amity and Commerce between Great Britain and the United States, in 1794); and where there was no such treaty, the permission has been frequently announced in the very declaration of war. Sir Michael Foster (*Discourse of High Treason*, 183, 186.) mentions several instances of such declarations; and he says that the aliens were thereby enabled to acquire personal chattels, and to maintain actions for the recovery of their personal rights, in as full a manner as alien friends. The act of congress of July, 1798, before alluded to, provides, in cases where there may be no existing treaty, a reasonable time, to be ascertained and declared by the president, to alien enemies resident at the opening of the war, 'for the recovery, disposal and removal of their goods and effects.' This statute may be considered, in this respect, as a true exposition and declaration of the modern law of nations."

In *1 Kent's Commentaries*, pp. *56-66, this doctrine is vigorously maintained.

Not only did these authorities formulate the policy of our country, but their views are supported by modern writers on international law.

Thus in *Wheaton on International Law*, Fifth English Edition (1916), p. 421, it is said:

"It appears, then, to be the modern rule of international usage, that property of the enemy found within the territory of a belligerent state, or debts due to his subjects by the government or individuals, at the commencement of hostilities, are not liable to be seized and confiscated as prize of war. This rule is frequently enforced by treaty stipulations, but unless it be thus enforced it cannot be considered as an inflexible, though an established, rule." See also pp. 424-426.

Our Government sanctioned this policy in its early treaties. Thus in the treaty between Great Britain and the United States negotiated in 1794 and proclaimed in 1795, Article X declares:

"Neither the debts due from individuals of one nation to individuals of the other, nor shares, nor moneys, which they may have in the public fund or in the public or private banks, shall ever in any event of war or national differences be sequestered or confiscated, it being unjust and impolitic that debts and engagements contracted and made by individuals having confidence in each other and in their respective governments, should ever be destroyed or impaired by national authority on account of national differences and discontents."

In the treaty of amity and commerce between the United States and Prussia, concluded on January 11, 1799, and proclaimed on November 4, 1800, which bears the signature of John Quincy Adams, it is expressly provided:

"Art. XXIII. If war should arise between the two contracting parties the merchants of either country then residing in the other shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely carrying off all their effects without molestation or hindrance * * *."

Article XXIV of the same treaty, which dealt with the treatment of prisoners of war, concluded as follows:

"And it is declared that neither the pretense that war dissolves all treaties, nor any other whatever, shall be construed as annulling or suspending this and the next preceding article; but on the contrary that the state of

war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature and nations."

Article XVI of that treaty contained the most favored nation clause, as did likewise Articles IX and XII of the treaty of May 1, 1828, between the two countries, which continued in force the provisions of Articles XXIII and XXIV. The German Empire succeeded to the rights and duties of Prussia under this treaty (*The Appam*, 243 U. S. 124; *Shultz, Jr., Co., Inc. v. Raimés & Co.*, 99 Misc. 626).

Referring to the treaty with Prussia, Alexander Hamilton, in *Camillus Letters XXII*, spoke of it as a model of liberality for the principles it contained and stated that it had been the subject of deserved and unqualified admiration in our country. He especially mentioned Article XXIII above quoted.

See also *Camillus Letters XVIII and XXII*.

In *Westlake's International Law, Part II* (1907), that distinguished publicist exhaustively discusses the development of the policy which protects property and rights of an enemy subject within the territory of a belligerent state (pp. 36-48). After referring to the modern treaties, he says:

"Permission to enemy subjects to remain in the country, even if in the express words of the treaty it should happen to stand alone, must in common sense carry with it permission to enjoy their property while so remaining. And if enemy subjects being in the country may enjoy their property, it would be inequitable to confiscate that of those who are not in it and therefore as individuals

cause no danger. This has been admitted by the conclusion of many treaties in which it is expressly stipulated that the debts, shares in public funds or in companies, and moneys in banks of the respective subjects, shall not be sequestered or confiscated in case of war. The system of the treaties may therefore be deemed to amount to a general agreement, on the part of governments, that modern international law forbids making prisoners of persons or confiscating the property of enemy subjects in the territory at the outbreak of war, or, saving the right of expulsion in case of apprehended danger to the state, refusing them the right of continued residence during good behavior."

In *Twiss' Law of Nations, Part II, Sections 49-56*, and *Hall on International Law, Seventh Edition (1917), Section 144*, as well as in *Phillmore's Commentaries on International Law, vol. 3, pp. 147, 148*, there is a like recognition of this modern doctrine.

In *Oppenheim on International Law, vol. 2, Second Edition, Section 102*, the author thus expresses his views on the subject:

"In former times all private and public enemy property, immovable and movable, on each other's territory could be confiscated by the belligerent at the outbreak of war, as could also enemy debts; and the treaties concluded between many states with regard to the withdrawal of each other's subjects at the outbreak of war stipulated likewise the unrestrained withdrawal of such private property of their subjects. Through the influence of such treaties, as well as of municipal laws and decrees enacting the same, an international usage and practice grew up that belligerents should neither confiscate private enemy prop-

erty nor annul enemy debts on their territory. The last case of confiscation of private property is that of 1793 at the outbreak of the war between France and Great Britain. No case of confiscation occurred during the nineteenth century, and although several writers maintain that according to strict law the old rule, in contradistinction to the usage which they do not deny, is still valid, it may safely be maintained that it is obsolete, and that there is now a customary rule of international law in existence prohibiting the confiscation of private enemy property and the annulment of enemy debts on the territory of a belligerent."

Not only did the American decisions and the opinions of publicists which we have quoted lay down these principles, but the English courts expressed the same views.

Thus, in *Wolff v. Oxholm*, 6 Maule & Selwyn, 92, decided in 1817, a British subject sued a Danish subject for a debt which the latter alleged had been confiscated by the Danish Government under an ordinance issued by it at the commencement of war with Great Britain in 1807. Lord Ellenborough, deciding for the plaintiff, said that the Court had been unable to discover that there ever was a time when it was the general practice of nations to confiscate debts; that although there had been instances of such confiscation in the sixteenth and seventeenth centuries, yet there had not been a single instance found for something more than a century. The Court accordingly held that as the Danish ordinance was not conformable to the usage of nations, the parties could not respect

it and neither they nor the Court were bound to regard it.

See also:

Porter v. Freudenberg, L. R., 1 K. B.
(1915) 857;

Mrs. Alexander's Cotton, 2 Wall. 404-419;
Hanger v. Abbott, 6 Wall. 532.

This was the state of the law when the sale of its shares in the Botany Worsted Mills was made by the Leipzig Company to the New York Company. The parties had the right to believe that, even if war should ensue, our Government would recognize, so far as it was concerned, the validity of the transfer. The vendor had the assurance that, even in the event of war, it would be protected in the enjoyment of its property, and that it would have the right, so far as it was capable of being carried away, to remove its property from our territory. An actual transfer made before the declaration of war, even though there had been a suspension of diplomatic relations, was, therefore, effective, as authorized by law, by treaty, and by custom, and at the same time was in every way consonant with ethics and good morals.

But we may go further and assume that these parties might have anticipated a state of war, even though at the time when the contract was entered into, there was still reason to believe that war between the United States and Germany might be averted, yet they certainly could not have been expected to anticipate the terms of the Trading with the Enemy Act passed on October 6, 1917, nearly eight months after the execution of the contract. Until the passage of that law the doc-

trine of *Brown v. United States*, *supra*, must have been regarded as in full force and controlling. There was then nothing upon the statute books granting to the Government the right to capture the property of the subject of a nation, either actually or potentially an enemy, where such property had its situs within our territory. It would, therefore, be abhorrent to one's sense of justice to charge the parties to this contract, at the time they entered into it, with the intent and purpose of circumventing a law, not yet contemplated, relating to a state of war that did not exist.

How inconsistent would such a theory be with the principles laid down by Hamilton in *Camillus Letters XIX*:

"The right of holding or having property in a country always implies a duty on the part of its government to protect that property, and to secure to the owner the full enjoyment of it. Whenever, therefore, a government grants permission to foreigners to acquire property within its territories, or to bring a deposit it there, it tacitly promises protection and security.

"There is no parity between the case of the person and goods of enemies found in our country and that of the persons and goods of enemies found elsewhere. In the former there is a reliance upon our hospitality and justice; there is an express or implied safe conduct; the individuals and their property are in the custody of our faith; they have no power to resist our will; they can lawfully make no defense against our violence; they are deemed to owe a temporary allegiance; and for endeavoring resistance would be punished as criminals, a character inconsistent with that of an enemy. To make them a prey is, therefore, to infringe every rule of generosity and

equity; it is to add cowardice to treachery. In the latter case there is no confidence whatever reposed in us; no claim upon our hospitality, justice, or good faith; there is the simple character of an enemy, with entire liberty to oppose force to force.

"Moreover, the property of the foreigners within our country may be regarded as having paid a valuable consideration for its protection and exemption from forfeiture; that which is brought in commonly enriches the revenue by a duty of entry. All that is within our territory, whether acquired there or brought there, is liable to contributions to the treasury, in common with other similar property. Does there not result an obligation to protect that which contributes to the expense of its protection? Will justice sanction upon the breaking out of a war, the confiscation of a property which, during peace, serves to augment the resources and nourish the prosperity of a state?

"The property of a foreigner placed in another country, by permission of its laws, may justly be regarded as a deposit, of which the society is the trustee. How can it be reconciled with the idea of a trust, to take the property from its owner when he has personally given no cause for its deprivation?"

Had the Leipzig Company, in anticipation of war between the United States and Germany, undertaken to sell its shares of stock in the Botany Worsted Mills, at either private or public sale, at any time prior to April 6, 1917, the act would have been unquestionably valid and free from criticism and the purchaser would have acquired good title. Even after April 6, 1917, and at any time prior to October 6, 1917, it could unquestionably have sold its shares under the protection of the treaty with Prussia proclaimed in

1800, and of the principles of international law that we have discussed. It would have been likewise lawful, at any time prior to the Declaration of War, to have organized an American corporation to acquire these shares of stock and to eliminate the title of the Leipzig Company. If the latter, by virtue of the terms of such sale, became the creditor of the purchaser for the whole or any part of the purchase price, the validity of the sale would not thereby have been affected, and title would none the less have passed. Under the authorities which we have just discussed even the debt owing by the purchaser to the Leipzig Company could not have been made the subject of capture without the enactment by Congress of an express statute authorizing such capture. As has been shown that was not done until October 6, 1917. Hence, the transfer made by the Leipzig Company to the New York company, far from being fraudulent or savoring of bad faith, was hemmed about with legal sanctions. To predicate fraud upon these facts would in itself amount to bad faith.

We have thus far discussed this phase of the case on the theory that the legal title to the shares in the Botany Worsted Mills that had belonged to the Leipzig Company was not undertaken to be transferred until February 20, 1917. In fact, the transfer of the legal title to those shares of stock to Hans E. Stoehr and Max W. Stoehr, as trustees, took place in 1915, long before it was ever seriously contemplated that war would arise between the United States and Germany. The contract of February 20, 1917, transferred the equitable title remaining in the Leipzig Company, and concurrently with that transfer, Hans E. Stoehr and Max W. Stoehr as the holders of the

legal title, acting in accordance with the terms of the contract actually transferred the legal title to the shares upon the books of the Botany Worsted Mills to the New York Company.

When the possibility of war was recognized in February, 1917, the parties therefore had the right to do just what they did. The Botany Worsted Mills was an important industry, and in view of the fact that Hans E. Stoehr and Max W. Stoehr were residents of the United States, the latter a citizen and the former desirous of becoming a citizen, it was entirely natural, under the circumstances, for such a transfer to be made, thus making it possible to preserve and conduct the business without embarrassment, and, as the sequel showed, to enable that great industry to be utilized in the manufacture of materials required by our Government for carrying on the war.

We might rest this branch of our argument here, but we prefer to analyze the various contentions of the appellees from which they seek to deduce the inference of fraud and in which is predicated the conclusion that the sale of the shares was colorable.

(1) The claim of fraud is based on the fact that the co-partnership of Stoehr & Sons transferred its assets to Stoehr & Sons, Inc., thus enabling the latter to carry on business, which the partnership could not have done in the event of war—a perfectly valid transaction. It is based on the further fact that the proceedings resulting in the incorporation and the acquisition of the property of the partnership were carried into effect by means of resolutions apparently prepared in advance of the meeting. This was in conformity with the almost uniform practice prevailing with respect to the formation of corporations.

(2) It is argued that this transaction was carried out with haste. There is nothing in the record distinguishing the method of organization here pursued from that resorted to in thousands of other instances. It is said that under the terms of the copartnership, transactions involving more than \$25,000 were not permitted except with the approval of all of the members of the firm. The uncontradicted evidence is, that this rule, almost from the very beginning, was with the consent of all of the parties more honored in the breach than in the observance (*Rec. p. 121*). At the most, a disregard of this provision was merely an irregularity and did not render a transaction ignoring it void. It certainly does not lie with the appellees to question the validity of the transfer because of a disregard of such a provision. There is, however, nothing in the record to show that the transfer was not in fact made with authority from the European members of the partnership. Hans E. Stoehr, who died shortly after the outbreak of the war and who executed the instruments which are now sought to be attacked, presumptively had authority to act in the premises. The maxim *omnia praesumuntur rite esse acta* is applicable to the facts here disclosed.

(3) Fraud is also sought to be predicated on the fact that there was an alleged failure to comply with the complicated procedure adopted with respect to the transfer of shares of stock in the Botany Worsted Mills, where the stock certificates were in Germany. For the reasons already stated a variance from this procedure did not affect the validity of the transfer of the equitable title to the shares, and, for the same reason, cannot be deemed

to have constituted a fraudulent transfer. So far as the Alien Property Custodian is concerned, he was certainly not a *bona fide* purchaser of the shares of stock. There is no question here as to creditors, or as to liability to the corporation for calls or assessments. The fact, therefore, that the transfer was made in an informal, rather than in a technically formal, manner cannot be made the predicate of a charge of fraud.

(4) But it is argued that the terms of sale were of such a character as to evince the intention that, notwithstanding the transfer, the control of the shares was to be left with the Leipzig Company, and that there was in fact no sale. A further analysis of the contract will show that there is no justification for such an argument.

It is true that only \$5,000 were paid on account of the purchase price at the time of the sale. It is likewise true that the sale was to be for a full and adequate consideration. The price was to "be determined by" and to "be equal to the book value of said shares as shown by the books of the Botany Worsted Mills" (*Rec. p. 14*). In view of the fact that the price was to be payable in five instalments covering a period of five years, it was stipulated that each of these instalments was to be based upon and to be equal to the book value of the shares as shown by the last previous closing of the books of the Botany Worsted Mills on the 30th of November preceding the falling due of each of the annual instalments (*Rec. p. 15*). In fixing such valuation the net worth of the "hard assets," that is, the tangible property, of the Botany Worsted Mills was to be the basis for the computation of the value of these shares, and

it was expressly stipulated that "no allowance or increase shall be made on such instalment for good will" (*Rec. p. 15*).

The contract therefore secured to the New York Company as a potential profit, not only the value of the existing good-will, but all such increase in the good-will as time would develop. In lieu of interest on the deferred payments it was stipulated that, in addition to the book value of the shares, there should be taken into consideration and account the amount of dividends received by the New York Company during the period elapsing before the final payment of the several instalments. These dividends were to be apportioned, based on the amount of the purchase price remaining unpaid. This was entirely equitable to both parties.

(5) It is argued that the New York Company did not have sufficient assets to pay for these shares in accordance with the terms of payment. That overlooks entirely the fact that the New York Company had assets amounting to upwards of \$1,000,000 (*Rec. p. 116*) independently of the 14,900 shares of the Botany Worsted Mills; that considering the character of the property of the Botany Worsted Mills, the fact that the New York Company controlled a majority of the capital stock of that important company, that under the terms of this contract it had the benefit of the good-will of that corporation so far as it was reflected in the shares of stock acquired, there would have been no difficulty for it to have financed this transaction. There are few industrial companies that could have made a better financial showing than the Botany Worsted Mills. The facts set forth

in the prospectus issued by the Alien Property Custodian substantiate this statement (*Exhibit 10, Rec. p. 204 to 209*). There are many bankers in the City of New York who would have been ready to finance the undertaking, especially in view of the fact that the men who had grown up with the business would have continued their connection with it.

To say, therefore, that this transaction was on its face fraudulent or colorable, totally disregards well recognized methods of corporate finance. If the purchase price based on book value had been paid on February 20, 1917, to the Leipzig Company, it would then have been argued on behalf of the appellees that such payment at that period constituted a badge of fraud, because it enabled the Leipzig Company to transfer its property out of the jurisdiction of the United States. And the same argument is made when the purchase price payable to the Leipzig Company still remains in this country subject to seizure by our Government under the Trading with the Enemy Act, as, in fact, it has been seized. One would suppose that, of the two methods, the latter is certainly less susceptible to the imputation of fraud than the former, and, far from bearing the earmarks of invalidity, establishes the good faith and honesty of purpose underlying the transaction.

(6) We shall pay no attention to the claim that fraud could be predicated on the fact that the Leipzig Company was given a lien on these shares as collateral security for the payment of the purchase price or such part of it as remained unpaid. Our Government certainly has not been deprived of any potential rights by reason of that fact. There has been nothing to prevent it from seizing

the rights of the Leipzig Company as such creditor and from taking to itself the benefit and advantage of the lien thus created. If no such lien had been conferred, then it might have been argued with some force that the transaction was subject to suspicion. The fact that such security was conferred made it entirely normal.

(7) It is further asserted that the failure to pay the first instalment when due operated as a re-transfer to the Leipzig Company of the shares of stock, and that the non-payment of an instalment of the purchase price for a single day after the date of its maturity operated as a forfeiture of the rights of Stoehr & Sons, Inc., to these shares. That conclusion is entirely at variance with the terms of the contract. In the first place, forfeitures are not favored in the law. In order to create a forfeiture it is necessary to proceed in strict conformity with the contract. The Fifth paragraph requires the Leipzig Company to notify the New York Company in writing that it requires the payment of the instalment before there can be any forfeiture. It is only in the event that the New York Company shall within sixty days after such demand fail to pay the instalment that the stock is to be retransferred to the Leipzig Company on the books of the Botany Worsted Mills. It is only then that the rights of the New York Company to the stock shall cease. No such notice was ever given by the Leipzig Company. No basis for a forfeiture has therefore been created.

Moreover, the Alien Property Custodian has undertaken to seize these shares of stock and to contest the right of Stoehr & Sons, Inc., to their ownership. To claim, therefore, that these shares of stock were to be retransferred to the Leipzig

Company is contrary to the express terms of the contract.

Furthermore, it is to be remembered that at the time when the first instalment became payable, the Trading with the Enemy Act had been enacted. Sections 2 and 3 expressly forbade the payment of any debt or obligation to an enemy. The Leipzig Company was at that time an enemy. The vested rights of the New York Company could not be divested or forfeited because of non-payment of its debt to an enemy.

(8) But it is further argued that these provisions show that the Leipzig Company reserved to itself the control of the shares of stock of the Botany Worsted Mills by virtue of this agreement. There is absolutely nothing in the instrument to warrant such an interpretation. Every provision contained in it was calculated merely to protect the interests of the Leipzig Company as a creditor of the New York Company. The latter as the legal or equitable owner of these shares, had full control over them. It exercised that control by voting on these shares. The record shows that Max W. Stoehr voted as proxy for the New York Company on 20,780 shares of the Botany Worsted Mills, which included these 14,900 at the election held at the instance of the Alien Property Custodian when his nominees were chosen as directors (*Rec.*, pp. 113 to 116, 161, 247). On the other hand, the Leipzig Company merely had a lien on the shares in order to secure the unpaid purchase money, just as it would have had a lien upon a piece of real estate for which it received a purchase money mortgage for the land. The provision for a retransfer in the event of the non-payment of the purchase money was similar in

character. When one considers the date when this contract was made, and the fact that for nearly eight months thereafter Congress had not even legislated so as to enable it to capture the claim of the Leipzig Company for the unpaid purchase money, it is applying in its most obnoxious form the *post hoc propter hoc* method of reasoning.

(9) In support of these phases of their argument the appellees rely on "*The Benito Estenger*," 176 U. S. 568, and other cases hereinafter mentioned. There a vessel, belonging to subjects of Spain and residents of Cuba, was during the progress of the Spanish-American war transferred by bill of sale to a British subject. The vessel was engaged in trading between Jamaica and Cuba and was captured while on a voyage. At the time of her capture she had a Spanish crew and Spanish officers, the former owner was on board as supercargo, and the Spanish flag was in the locker of the vessel, though at the moment of capture she was flying the British flag. There was no proof that the former owner was a Cuban rebel or had renounced his allegiance to Spain. Under the circumstances it was concluded that the transfer was merely colorable. In fact it was admitted by the claimant's counsel that it would not be contended that all of the interest of the former owner in the vessel ceased at the time of the sale, that the transfer was obviously made to protect the steamer as neutral property from seizure, that he still retained a beneficial interest after the sale and transfer of flags, and continued to act for the vessel as supercargo. The transfer of the vessel was thus made *flagrante bello*, and she continued to trade with the enemy in supplies necessary for his forces after the transfer, just as she had before.

It was in the light of these facts that the Court, quoting from Hall's International Law, intimated that a transfer of a vessel at such a time is not held to be good "if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war."

This case is in no wise parallel, and none of the elements emphasized in the case cited is present here. The transaction was completed before the declaration of war. The Leipzig Company had no interest in the shares of stock, as such, but merely held them as collateral security. It retained no control over the shares. It possessed no power of revocation of the contract. Nor had it the right to have the shares restored to it at the conclusion of the war.

There were certainly no "strings" to the present transaction. The Leipzig Company parted unconditionally with its right of property in the shares. It retained merely the right to be paid the agreed purchase price, and as collateral security for such payment was given possession of the shares.

Nor is this case governed by *The Carlos F. Roses*, 177 U. S. 655, and the authorities which it cites. That vessel was captured during the Spanish-American War while proceeding to Havana with a cargo of provisions. She was owned at Barcelona and sailed from that port for Montevideo, Uruguay, with a cargo which was discharged there, where she took on board for Havana the provisions in question. A British company doing business in London laid claim to the cargo on the ground that they had advanced money for its purchase to a citizen of Monte-

video and received bills of lading covering the shipment. It was held that the vessel was an enemy vessel. The presumption was that the cargo was enemy property. That this presumption had not been overcome is apparent from the opinion. Neither was it shown that the British company had acquired the legal title to the merchandise which constituted the cargo. The fundamental proposition decided, however, was that the right of capture acts on the proprietary interest of the thing captured at the time of the capture and is not affected by the secret liens or private engagements of the parties. Consequently the belligerent right was held to override the neutral claim. The authorities referred to in the opinion of Chief Justice Fuller all relate to cases in which there appeared to be enemy ownership of the title to the property seized.

In this fundamental respect the present case differs *in toto* from that cited. The proprietary interest of the thing captured or seized in the present case, 14,900 shares of the capital stock of the Botany Worsted Mills, was at the time of its capture in the New York Company, and at the time of seizure these shares of stock stood in the name of that Company in the books of the Botany Worsted Mills.

It is also important to bear in mind the distinction between property at sea and property on land that is recognized in the modern authorities on international law, and likewise the distinction between property as to which there is merely an agreement to deliver and that as to which, as in the present case, there has been so far as is practicable an actual delivery. It should not for a moment be forgotten that the shares of stock in the Botany Worsted Mills that stood in the name

of Hans E. Stoehr and Max W. Stoehr, as trustees, were transferred by them to Stoehr & Sons, Inc., the New York Company, immediately upon the execution of the contract of sale on February 20, 1917. These conditions not only distinguish this case from *The Benito Estenger*, *supra*, but also from the other authorities cited in the opinion of Judge Hand (*Rec.*, p. 317).

In *Wheaton's International Law*, 5th English Edition; p. 568, the author says:

"The progress of civilization has slowly but constantly tended (in theory) to soften the extreme severity of the operations of war by land; but it still remains unrelaxed in respect of maritime warfare, in which the private property of the enemy taken at sea or afloat in port is liable to capture and confiscation, subject, however, to the already mentioned exemptions relative to enemy merchant vessels on the outbreak of war, hospital ships, fishing vessels, cartel ships, &c., and to the exemption introduced by the Declaration of Paris."

On page 574 the author says:

"It is often a matter of difficulty for a prize court to determine to whom property captured at sea actually belongs. The general rule is that if goods are shipped on account and at the risk of the consignee, they are considered his goods during the voyage. In such a case the delivery of the goods to the master is a delivery to the consignee (*The Packet de Bilbao*, 2 C. Rob. 133). In time of peace the parties may, of course, agree to any terms they please as to whose risk the property should be at during the voyage, but in time of war, or in contemplation of war, the rule of prize courts is that property which has a hostile character at the commencement of the voyage, cannot change that character

by assignment while it is in transitu so as to protect it from capture. (*The Vrow Margaretha*, 1 C. Rob. 336.)"

See also:

2 *Twiss' Law of Nations*, §§162, 163.

Hall's International Law, 7th ed., §§169-174.

The Jan Frederick, 5 Ch. Rob. 128, involved the transfer *in transitu* of property while at sea.

In *The Sechs Geschwistern*, 4 Ch. Rob. 100, the subject-matter of the proceeding was a ship of which there had been no actual sale. The contract relating to its contained an express agreement to restore it to the enemy vendor at the end of the war.

In the case of *The Jemmy*, 4 Ch. Rob. 31, the ship remained uninterruptedly in trade for the belligerent power and under the control and management of the enemy.

The Vrow Margaretha, 1 C. Rob. 336, related to the transfer of a shipment of wine *in transitu*. Sir William Scott there said:

"In the ordinary course of things in time of peace—for it is not denied that such a contract may be made, and effectually made (according to the usage of merchants) such a transfer *in transitu* might certainly be made. It has even been contended that a mere delivering of the bill of lading is a transfer of the property. But it might be more correctly expressed, perhaps, if said that it transfers only the right of delivery; but that a transfer of the bill of lading with a contract of sale accompanying it, may transfer the property in the ordinary course of things, so as effectually to bind the parties, and all others, cannot well be doubted. When war in-

tervenes, another rule is set up by courts of admiralty which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment *till the actual delivery*; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy."

The Baltica, 11 Moore, P. C. 141, likewise related to the seizure of a ship. It was under Danish colors when seized. It had previously flown the Russian flag. When the Crimean War was imminent the vessel, while in the course of a voyage from Libau to Copenhagen, was sold. She arrived at her destination and was taken into possession by the purchaser. It was held that the sale, though made whilst the ship was *in transitu*, was valid, since the *transitus* had ceased when the vessel had come into the possession of the purchaser, which occurred before the seizure. In reaching this conclusion the Privy Council carefully reviewed the authorities, and the theory of the decision is expressed in the following passage:

"It is true that, in one sense, the ship and the goods may be said to be in transitu till they have reached their original port of destination; but their Lordships have found no case where the transfer was held to be inoperative after the actual delivery of the property to the owner. That the transitus ceases when the property has come into the actual possession of the transferee, is a doctrine perfectly consistent with the decisions * * * on the authority of which the former case was decided."

In *The United States*, L. R. Prob. Div. (1917) 30, the rule was stated that in time of war goods shipped from an enemy country to a neutral coun-

try, or from a neutral country to an enemy country, are regarded as enemy property, *qua* the rights of belligerent captors, *until delivery*.

In *The Bawean*, L. R. Prob. Div. (1918) 58, the property seized was shipped from a Chinese port on a German vessel bound to Hamburg. While still *in transitu* it was sold by the German owners to a neutral. It was held that it retained the enemy character until it reached its destination.

The Daska, L. R. App. Cas. (1917) 386, and *The Southfield*, L. R. App. Cas. (1917) 390, likewise related to property at sea at the time of its transfer which took place at a time when war was imminent. In both cases special circumstances led the Court to deny the right of condemnation.

None of these cases referred to a transfer of property on land, and in none of them was the doctrine of the right of capture applied in a case where there had been a delivery prior to the time when capture was attempted. Consequently they afford no authority for the appellees' contention. Indeed they support appellant's position.

Judge Hand recognizes that the judgment rendered in *The Baltica*, *supra*, does not sustain his theory. He frankly admits that there is a difficulty in his reasoning so long as "a policy of land capture" has not been inaugurated. That such a policy had not been inaugurated at the time of the outbreak of the war between the United States and Germany, or until the enactment of the Trading with the Enemy Act on October 6, 1917, must necessarily be conceded. Hence the infirmity of the attempted analogy between a capture on land and a capture at sea at once becomes apparent.

The soundness of our contention is further accentuated by Section 7 (b) of the Trading with the Enemy Act, which Judge Hand himself re-

guards as effectively closing the discussion on this point. That provision reads:

"* * * no person shall by virtue of any assignment, * * * to him of any * * * chose in action by * * * an enemy or ally of enemy have any right or remedy against the debtor, obligor or other person liable to pay, fulfill or perform the same unless said assignment * * * was made prior to the beginning of the war * * *."

This clearly recognizes the validity of a transfer of a chose in action made before the beginning of the war. Under the decision in *Jellenik v. Huron Copper Co.*, 177 U. S. 1, an assignment of an interest in rights to shares of stock is to be regarded as analogous to an assignment of a chose in action. Consequently, as Judge Hand admits, the principle applies "*a fortiori* to equitable interests in shares."

There can be no question as to the soundness of his conclusion as to this phase of the subject, whatever may be said as to the method by which it is reached (*Rec. p. 318*):

"It can scarcely be supposed that an exception would be made in favor of *ante bellum* transfers of choses in action which did not apply to property so nearly akin as this, or indeed to all property, and it is clear that absolute transfers of choses in action before April 6, 1917, would be valid. Apparently the United States meant not to inquire into such transfers as in fraud of its rights. There is no reason to extend the application of so penal a statute beyond its fair import."

(10) The ultimate ground of the decision of the Court below is that, in the making of the contract,

it was intended that the beneficial ownership of the Leipzig shares was always to remain in the Leipzig Company; "that there never was any transfer at all" (*Rec. p. 317*), and that "the contract conveyed nothing to Stoehr & Sons, Inc." (*Rec. p. 318*), the instrument being "not a contract of purchase, but only an option" (*Rec. p. 314*).

It has been shown under Point I that the instrument of February 20, 1917, immediately followed by a transfer of the shares on the books of the Botany Worsted Mills to the New York Company, was not the grant of an option, but an absolute sale and transfer of the ownership of the Leipzig Company in the shares. If the transfer was, as has been shown, free from fraud, for the reasons above discussed, then its validity cannot be questioned by the Government. To say that the contract conveyed nothing if it was an absolute transfer free from fraud, is an obvious inconsistency. If, in legal effect, it operated as a transfer, it cannot at the same time be a mere colorable transfer. It certainly was intended to pass the title of the shares to the New York Company.

We are not concerned with any questions that may or may not arise between the shareholders of the Leipzig Company and the New York Company. No claim has been made on behalf of those shareholders questioning the validity of the transfer or the sufficiency of the consideration. There is no pretense that there has been any disavowal of it by them or on their behalf. Nor has there been any question as to the authority of Hans Stoehr to make the transfer. Judge Hand in his opinion says (*Rec. p. 312*), that he assumes "that Hans E. Stoehr had a general authority which

would cover the execution of contracts for the sale of such property as this for a consideration such as this."

In support of the conclusion that the instrument was "not intended to represent the real purpose of the parties at all, but to serve as a cover for another purpose," reference was made in the opinion to the terms of the contract of February 20, 1917, and to the statements made by Hans E. Stoehr and by Mr. Heyn to the Alien Property Custodian at about the time of the seizure. We shall now briefly consider these propositions.

I.—The claim that the contract cannot be justified either as a sacrifice sale or as a commercial transaction is unsound.

This contention is based on the theory that the business of the Botany Worsted Mills had been successful, had been in operation for twenty-eight years, that its plant was extensive and admirably equipped, that there was no reason for the Leipzig Company to dispose of its interests in the corporation, and that the consideration to be paid for the 14,900 shares of stock by the New York Company was inadequate.

This theory loses sight of the essential facts, that at the time when this contract was entered into, although it was entirely lawful for the Leipzig Company to sell its interest in the Botany Worsted Mills, a critical situation had arisen—diplomatic relations between the United States and Germany had been severed. Although there was no certainty that war would ensue, it was not at all improbable that it would. It was self-evident that, if the two governments became belligerents, the Leipzig Company would be unable to

participate in the management of the Botany Worsted Mills, and that the affairs of that corporation would encounter serious practical difficulties and embarrassment. Although at that time it could not have been foreseen that in the contingency of war our Government would seize the shares formerly owned by the Leipzig Company, it was but natural that the latter should recognize the desirability of its retirement from the American field, while it was still possible to do so, and thereby avoid the hazards that might flow from the abnormal conditions that were likely to prevail.

On the other hand the New York Company, two of its stockholders, Hans E. Stoehr and Max W. Stoehr, being residents of this county and one of them an American citizen, and the other seeking to become one was not encountering the risks with which the Leipzig Company might have to reckon in the event of war. They had every reason to believe that an American company, under their management, would not be disturbed in its conduct of the business of the Botany Worsted Mills. By means of such management the integrity of the undertaking would not be imperiled or disturbed.

The purchase of the stock owned by the Leipzig Company by the New York Company was, therefore, a conservative transaction on the part of the vendor and vendee alike. The general purpose of preventing the dismemberment of the Botany Worsted Mills was a sufficient reason for the purchase by the one and for the sale by the other of the parties. The transaction, in the then state of the law and under the then existing conditions, was not only a legitimate, but a practical, commercial transaction.

The assertion that the consideration reserved in the contract was inadequate because the item of good-will was not a factor in the ascertainment of the purchase price, proceeds on an erroneous theory. The contract would have been more susceptible of criticism had the New York Company, at that juncture, bound itself to pay, not only the book value of all of the "hard assets," but also the value of the good-will. It would then have been argued that there was no reason why the New York Company should incur all the hazards and pay the Leipzig Company the last dollar of valuation that could be placed upon the shares owned by it in the Botany Worsted Mills. It is a matter of common experience that, in the sale of an important business or of a large block of shares in a business corporation, the element of good-will is eliminated in whole or in part in fixing the purchase price. It is likewise a matter of common knowledge that the market value of the shares of stock of a corporation does not control in fixing the price to be paid for a considerable block of such shares. Sometimes the market value exceeds the book value, and at other times the converse is the fact. In the circumstances under which this contract was made it was just to both parties that the contract should provide for the ascertainment of the book value at the various dates when the instalments of the purchase price were to be paid and the stock which was held in pledge was to be surrendered. In order to give the vendee an incentive to enter into the contract, it was but reasonable that the purchaser should have the benefit of the good-will, and that it should not be separately valued at the various dates when the book value was to be ascertained.

in order to swell the purchase price to the disadvantage of the purchaser.

Moreover, good-will is property of an evanescent nature. It is easily volatilized. The possibility of a war, whose outcome could not be foreseen, of itself tended to deteriorate, or at least threaten to diminish seriously, the value of the good-will of an industrial business such as that of the Botany Worsted Mills. When the Leipzig Company, therefore, under the contract, was to receive the book value of its "hard assets," eliminating the value of its good-will, the bargain that was made was not to its disadvantage, but was fair to both sides.

The fact that the price of the stock was not specifically named in the contract, but was to be determined at the various periods when the book value was to be ascertained, does not tend to make the transaction colorable. The subject-matter of the contract constituted approximately a half interest in a corporation whose property was worth many millions of dollars. The value of this property was subject to fluctuation. It consisted largely of machinery that was likely to deteriorate physically and to become more or less obsolescent. It consisted also of raw materials the market value of which might suddenly rise, or with equal suddenness fall. This was likewise true of its merchandise manufactured or in process of manufacture. Its real estate was in constant jeopardy from the elements. It would have been the height of imprudence for the New York Company to have stipulated on February 20, 1917, to pay the then book value of this large property and thus assume all of the possible risks. On the other hand, it was fair to both parties and tended

to equalize the risks to make the price dependent upon the book values as they would be ascertained at the respective periods when the instalments of the purchase price were to be paid. It must be remembered that the Leipzig Company was retiring from the American field. The New York Company was to take its place. The former could not, therefore, expect to be guaranteed against any possible shrinkage in values during the period of time covered by the deferred payments, and the New York Company was to pay on what was an entirely equitable basis. If the contract had undertaken to fix the price according to the book values as ascertained on its date, there would have been infinitely stronger ground for questioning the *bona fides* of the sale. It might then have been said that the transaction was not in essence an ordinary and rational commercial transaction, because the New York Company would have burdened itself with all of the risks and would have practically disabled itself from deriving any potential profit from the transaction.

When one considers that the Alien Property Custodian is proposing to sell in one block these 14,900 shares of stock at public auction, under the stringent limitation of the statute restrictive of possible purchasers, where there is a certainty that the value of these shares will be sacrificed, the method adopted by the Leipzig Company and the New York Company of ascertaining the price was not only normal, but precisely what reasonable men of business would have done had they intended the transaction to be in every way genuine.

II.—The argument based on the letter of Heyn to the Alien Property Custodian.

The interpretation given by Judge Hand to this document is erroneous and does not take into account either the conditions under which it was written or those to which it referred. Stoehr & Co., the predecessor of Stoehr & Sons, Inc., was a partnership composed of Germans and Americans. It was naturally feared that if war should be declared the partnership would be dissolved. That would necessarily seriously embarrass and hamper the business theretofore conducted by the partnership. In order to avoid the consequences that would have been thereby entailed the corporation was organized and the partnership interests were converted into stockholding interests, the proportions of the previous partnership interests being maintained.

The belligerent rights of our Government in the event of the outbreak of war would have been in no wise affected by this incorporation. Under the Trading with the Enemy Act, subsequently passed, the interests of the German stockholders could be captured, as in fact they were, to the same extent as their partnership interests might have been captured had there been no incorporation. The creation of a corporation, however, avoided the winding up and destruction of a lawful business, and enabled it to be carried on by an American corporation, which was necessarily under the control and supervision of the State of New York, under whose laws it became incorporated.

The acquisition by this New York corporation of 14,900 shares of the stock of the Botany Worsted Mills was likewise intended to conserve

the business of the latter corporation and to avoid the mismanagement or waste that might result were the control and management to fall into the hands of a small minority of stockholders. These 14,900 shares were held by Hans E. Stoehr and Max W. Stoehr as trustees for the Leipzig Company. The latter was the beneficiary of the trust. Being a German corporation it was certainly doubtful whether, in the event of war, the trustees would have been entitled to vote on the stock which they held in trust for the Leipzig Company. If they were precluded from so voting, then the voting power would have been vested in the minority stockholders and the owners of these 14,900 shares would have been completely in the power of the minority. For that reason it was believed that a sale by the Leipzig Company to the New York Company, which was under the control of Hans E. Stoehr and Max W. Stoehr, would prevent the dismemberment and possible destruction of the Botany Worsted Mills. That such a transfer would be valid was never for a moment doubted, both because of the terms of the treaty between the United States and Germany and because of the doctrines which we have heretofore discussed. In the event of war and the subsequent enactment of the Trading with the Enemy Act such a transfer would in no wise have interfered with the exercise of the war powers of our Government, the interests of the German stockholders in the New York Company could have been captured, and any amount owing by the New York Company to the Leipzig Company could likewise have been captured.

Judge Hand has expressly found that there was no fraud in carrying out the plan and that illegality could not be predicated of it. Why, then,

should the transaction be characterized as merely colorable when there was every reason, prompted by interest and prudence, for making it actual and genuine?

Read in the light of these facts, the letter of Mr. Heyn (*Defendants' Exhibit F; Rec. pp. 218-223*), which was likewise approved by the Botany Worsted Mills and the New York Company (*Rec. p. 233*), in every way sustains our contention that the transfer was not colorable. He was naturally anxious to exonerate himself and his clients from any imputation that he or they were seeking to circumvent and defeat the right of the Alien Property Custodian to seize enemy property. It was written at a period of great stress and at a time when the very name of a German gave rise to ugly suspicion and animadversion, and when every presumption was hostile and threats were quite prevalent. Referring to the organization of Stoehr & Sons, Inc., he said (*Rec. pp. 220, 221*):

“The immediate occasion for the organization of the corporation in February, 1917, was this: It was assumed that if there was a declaration of war between the United States and Germany, the partnership would probably have to cease, being dissolved by reason of the alien enemy character of Eduard Stoehr, the father, and George Stoehr, the brother, the results of such dissolution being of course obviously unfortunate and conceivably disastrous.

The partners retained the same proportional interest in the corporation as their interest in the partnership. * * * In other words somewhat more than 4/5 the interest in parties resident in Germany.

The certificate of incorporation and by-laws of the company provide for four directors.

They are as follows:

HANS E. STOEHR, President,
 GEO. ROEHLIG, Vice-President,
 MAX W. STOEHR, Secretary and Treasurer,
 ALFRED DE LIAGRA, Assistant Secretary
 and Assistant Treasurer.

It will be noted that these directors and officers are the same gentlemen mentioned above as directors and officers, etc., of Botany Worsted Mills and that all of them are residents of the United States.

As has been pointed out, the founder of the Botany Worsted Mills was Eduard Stoehr. As he is advanced in age (being 72 years) most of the active work during the past years has devolved on his sons. In this connection it may be stated generally that Eduard Stoehr, the father, and George Stoehr, the brother, were in charge of the Stoehr interests in Germany, and H. E. Stoehr and M. W. Stoehr of the interests in the United States. H. E. Stoehr represented his father and also Stoehr & Company, the Leipzig corporation, in this country."

He then explains the details of the stock control of the Botany Worsted Mills and shows that the beneficial interest of the 14,900 shares in the name of H. E. Stoehr and M. W. Stoehr, trustees for the Leipzig Company, was in that corporation.

He then frankly explains the contract of February 20, 1917 (*Rec. p. 222*), saying:

"Regarding the contract for the purchase of said 14,900 shares by Stoehr & Sons, Inc., from Stoehr & Co. of Leipzig, Germany, it has been fully explained that the control of Botany might be imperiled by a state of war, because the voting right on stock of alien enemies or in which alien enemies had the beneficial interest (as was the case with said 14,900 shares) was doubtful under the deci-

sions of the courts, and if deprived of the voting right, the control of Botany might be lost. This contract was made with reference to the control of Botany as between its stockholders and had of course no reference to the status of such control so far as the Alien Property Custodian is concerned. Such status is not affected whether such shares are in Stoehr & Co., the Leipzig corporation, or in Stoehr & Sons, Inc., the New York corporation. * * *

To summarize: While Botany is managed in this country, considerably more than a majority of its stock is controlled by alien enemy interests within the meaning of the Alien Enemy Act; the total of the stock thus controlled (directly and indirectly) being 30,080 shares."

To say that Mr. Heyn, who expressed himself with such clarity as is evidenced by this letter, used the word "controlled" in the sense of "owned" is without justification. He was communicating with the Alien Property Custodian at a time when the latter was seeking to ascertain what, if any, interests alien enemies had in Stoehr & Sons, Inc., and in the Botany Worsted Mills. There was no attempt at concealment. The motives that prompted the organization of the New York Company and the transfer to it of the 14,900 shares were stated with entire accuracy. Mr. Heyn was interested in showing that the rights of the Government were in no manner prejudiced by a sale of the 14,900 shares to the New York Company, or by the transfer by the partnership of Stoehr & Co. of its assets to the New York Company. Looking at the subject from the standpoint of the Alien Property Custodian, he pointed out that the controlling interest in the stock of the New York Company was in German enemies

and that their interests could be captured by the Government if it so desired, and through such capture not only could the New York Company, but the Botany Worsted Mills, be controlled by the Alien Property Custodian.

Far from interfering with the belligerent rights of our Government, they were subserved by what had been lawfully done before the declaration of war. What Mr. Heyn was anxious to establish was that neither he nor his clients had been guilty of any unlawful acts. That they were not is conceded by Judge Hand, and is unquestionably shown by the authorities. It is a far cry between an insistence upon the good faith of all concerned and the explanation of their motives as given by Mr. Heyn and the conclusion from such statement that the contract of February 20, 1917, was merely colorable.

IV.

The equitable title to the shares of the Botany Worsted Mills having passed from the Leipzig Company to the New York Company on February 20, 1917, the fact that the consideration was to be paid later and that the shares of stock pledged as collateral security were to be redelivered from time to time as the instalments of the purchase price were paid, did not affect the title or render the contract executory and subject to dissolution upon the declaration of war.

Here, again, the status of the property is precisely the same as it would have been had it been a parcel of real estate located in New Jersey and

conveyed by the Leipzig Company to the New York Company subject to a lien for unpaid purchase money in favor of the Leipzig Company or to a mortgage to secure the unpaid purchase price. It would be futile to contend that, because the purchase money had not been paid by the New York Company prior to the declaration of war or the passage of the Trading with the Enemy Act, the executed contract under which it acquired its title became dissolved. So far as the transfer of title was concerned, the transaction became a completed one. So far as the obligation of the New York Company to pay was concerned, that rested *in futuro*.

The debt of the New York Company to the Leipzig Company was subject to capture and seizure under the Trading with the Enemy Act, and, as the record shows, it has in fact been seized. It would have been unlawful for the New York Company after the declaration of war, and certainly after the passage of the Trading with the Enemy Act, to pay to the Leipzig Company the instalments of the purchase price as they matured. Consequently the performance of the obligation to pay was suspended. That company could not, pending the war, have enforced payment, whatever the Alien Property Custodian may have done.

Cohen v. N. Y. Mutual Life Ins. Co., 50 N. Y. 610;

Sands v. New York Life Insurance Co., 50 N. Y. 626;

New York Life Insurance Co. v. Statham, 93 U. S. 24.

Mutual Benefit Life Ins. Co. v. Hillyard, 37 N. J. Law, 444.

The appellees have sought to bring this case within the decisions in *Zinc Corporation, Ltd. v. Hirsch*, (1916) 1 K. B. 541 and *Bieber & Co. v. Rio Tinto Co., Ltd.*, (1918) App. Cas. 260. We contend that neither of them presents a parallel. Both were contracts executory in character. In neither of them was the question presented as to whether the title to property had passed from the vendor to a vendee not an enemy or the ally of an enemy.

In the first of the cases the plaintiff, a British corporation, agreed to sell to the defendants and the latter, who resided and carried on business in Germany, agreed to purchase during each of ten years from 1910 to 1919, both inclusive, the whole of the plaintiff's production of zinc concentrates at their mine in Australia. By the terms of the contract the plaintiffs were prohibited, so long as the contract should be in force, from selling any zinc concentrates to any person other than the defendants, who were entitled at any time to leave 2200 tons of concentrates on the plaintiff's floors and 800 tons in their vats at the plaintiff's expense. The contract contained a "*force majeure*" clause, which provided that in the event of the happening of any of the contingencies specified the agreement should be suspended during the continuance of any and every disability specified. After the outbreak of the war between Great Britain and Germany an action was brought for a declaration that the contract had been dissolved by the existence of the war. It was evident that the contract, so far as it was sought to be dissolved, related to future production and future deliveries. There was no pretense that title to the zinc concentrates to be produced thereafter during the term of the contract had passed or that payment

had been made for such production. It was also held that the *force majeure* clause related only to the suspension of deliveries, and not to the whole contract, and that the prohibition against selling to any person other than the defendants was to prevent the plaintiffs from using their resources for the benefit of England. For these reasons the Court very properly held that the further performance of the contract after the outbreak of the war became illegal as being detrimental to the interests of the country and of assistance to the King's enemy. In the course of the opinion of Lord Justice Swinfen Eady he said:

"The result is that the outbreak of war has dissolved the contract between the parties so far as regards *the future performance after August 4, 1914*. The remedy of either side for what had previously been carried out remains in abeyance until the termination of the war. * * * There remains, however, another point of view from which the matter must be considered. The contract of 1910 not only provided that the defendant shall purchase the plaintiff's whole production, but it also stipulates that the plaintiff shall not sell their concentrates to any other person. This negative stipulation remains in force according to the tenor of the agreement as well during a war as during a temporary strike or accident or breakdown of machinery."

The second of the cases cited arose under agreements made before the war between Great Britain and Germany for the supply by the Rio Tinto Company of cupreous sulphur ore to three German companies. The vendor agreed to sell to the vendees a specified tonnage of ore to be shipped from Spain and to be delivered in Rotterdam, Hamburg, Stettin, or other European continental

ports. At the outbreak of the war a substantial part of the ore still remained to be delivered. Subsequent to the beginning of the war the Rio Tinto Company commenced actions against the several vendees for the abrogation of the contracts. These cases clearly came within the principle of *Zinc Corporation v. Hirsch*. The opinion of Lord Dunedin showed the *ratio decidendi* to be that a state of war between Great Britain and another country would put an end to all executory contracts which for their further performance require commercial intercourse between one contracting party, a British subject, and the other contracting party, an alien enemy. Special attention was directed to the fact that the dates of delivery under one of the contracts "so far as not performed, extended from August, 1914, to February, 1915, during which time a state of war has prevailed. It is also obvious that all dates of delivery under the second contract from February 1, 1915, up to the present time have been rendered illegal by the war."

Lord Sumner in his opinion laid stress on the same features of the case, saying:

"The rule of law which forbids a British subject to trade with the King's enemies is very ancient. Its effect upon trading contracts which, like the present, are executory on both sides, was already well settled by the middle of the last century. *Esposito v. Bowden*, 7 E. & B. 763, finally answered the last of the questions which had been raised down to that time."

Again he said:

"The whole contract, so far as it is mutually executory, is dissolved."

In the present case the title to the 14,900 shares of stock of the Botany Worsted Mills passed at once from the Leipzig Company to the New York Company on February 20, 1917. The payments to be made by the latter could of course not be made, while the war was pending, to the Leipzig Company. A debt for the purchase price from the New York Company to the Leipzig Company had come into existence concurrently with the passing of title. That debt was subject to seizure, under the Trading with the Enemy Act, by proceedings taken in conformity with the terms of that act. Such seizure was in fact attempted, and assuming that the requirements of the statute had been complied with, that debt became collectible on its maturity by the Alien Property Custodian. In the absence of such seizure the enforcement of the obligation incurred by the New York Company to the Leipzig Company was suspended; just as a liability on a promissory note for goods sold and delivered would have been suspended.

It would be most extraordinary if the appellees' contention should be sustained, namely, that although title to property may have passed, before the declaration of war, to an American corporation or to an American citizen from a German subject, that title would be divested if the vendee was not called upon by the terms of the contract to make payment in whole or in part prior to the declaration of war. There is such a manifest incongruity in such contention and the consequences of its adoption would be so disastrous, that elaboration of argument seems unnecessary to establish its unsoundness. The cases cited certainly do not support it. In fact the decision in *New York Life Insurance Co. v. Davis*, 95 U. S. 429, goes so far as to hold that the rule that war suspends all

intercourse between the citizens of two belligerent countries does not prohibit the payment of debts to an agent of an alien enemy where such agent resides in the same state with the debtor. If such payment were legal, certainly the fact of non-payment by an American citizen or corporation of an obligation incurred to an alien enemy who has parted with the title to the property from the sale of which the obligation to pay arose cannot operate as a dissolution of the executed contract of sale or as a divestiture of the title that has passed.

V.

Stoehr & Sons, Inc., the owner of these shares, being an American corporation, was not an enemy or ally of an enemy within the meaning of the "Trading With the Enemy Act." Consequently these shares of stock were not subject to capture or seizure under its terms, and the act of the Alien Property Custodian in condemning them as enemy-owned property, upon his determination that they were such, was without jurisdiction and void.

Under Point II it has been shown that even the property of an enemy cannot be seized on land in the absence of an act of Congress authorizing such seizure.

Brown v. United States, supra.

Such an act is highly penal in its character. It is in derogation of the common law. It involves a

forfeiture. It contravenes the humane and wise policy which seeks to mitigate the rigors of war and to exempt individuals from punishment for the wrongs committed by their government.

Cohen v. N. Y. Mutual Life Insurance Company (supra).

As was said in the case of "*Mrs. Alexander Cotton*," 2 Wall 404, 419:

"This rule as to property on land has received very important qualifications from usage, from the reasonings of enlightened publicists and from judicial decisions. It may now be regarded as substantially restricted 'to special cases dictated by the necessary operation of the war,' and as excluding, in general, 'the seizure of the private property of pacific persons for the sake of gain.'"

For these reasons, such statute must be strictly construed against the Government. The soundness of this doctrine is well illustrated by decisions under the Confiscation Acts of 1861 and 1862. The operation of these acts was limited strictly to the persons and property enumerated. They were held not to apply to the property of a corporation, *Risley v. Phenix Bank*, 83 N. Y. 318, *aff'd*, 111 U. S. 125; *Planters Bank v. Union Bank*, 16 Wall. 496; or to land alienated before their passage, *Conrad v. Waples*, 96 U. S. 279; or to the estate of a party other than the one for whose offences the property was seized, *ib.*; or to a mortgagee or lienor whose rights attached to the property prior to the commission of the offence for which it was attempted to confiscate it, *Day v. Micou*, 18 Wall. 156; *Shields v. Schiff*, 124 U. S.

351; *Waples v. Hays*, 108 U. S. 6; *Avegno v. Schmidt*, 113 U. S. 393.

The act under which the Alien Property Custodian has sought to condemn the rights of Stoehr & Sons, Inc., in the 14,900 shares of the capital stock of the Botany Worsted Mills expressly limits its operation to the property of an enemy and ally of enemy. Section 2 defines the word "enemy" as used in the act. So far as it is necessary to quote, it reads:

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory."

Stoehr & Sons, Inc., having been organized under the laws of New York and the Botany Worsted Mills having been incorporated under the laws of New Jersey, neither of them comes within the term "enemy" as so defined.

The words "ally of enemy," so far as that term is material in this case, are defined to mean:

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such

ally nation, or incorporated within any country other than the United States and doing business within such territory."

Under this definition neither Stoechr & Sons, Inc., nor the Botany Worsted Mills is an ally of an enemy.

The most minute and microscopic examination of the statute shows that no property other than that of an enemy or ally of an enemy comes within the purview of this legislation. With the greatest care there is repeated and reiterated the phrase "an enemy or ally of enemy." This necessarily excludes from the operation of the act those who are not enemies or allies of an enemy and all corporations organized within the United States. The Act, so far as corporations are concerned, is limited to those formed within the territory of a nation with which the United States is at war, or of an ally of a nation with which the United States is at war, or incorporated within any country other than the United States and doing business within such territory.

The Trading with the Enemy Act is modeled upon the British Act. Under its provisions it was held in *Re Ruben* (1915) 2 Ch. 313, that the act concerned itself "only with enemy property," and that "all that could be vested in the Custodian is enemy property."

See also Senate Committee Report on the Trading with the Enemy Act, p. 9; House Committee Report, printed as an Appendix to Senate Committee Report, pp. 11, 12, and the statement of Mr. Lee C. Bradley in Hearings Before House Committee on Interstate and Foreign Commerce on H. R. 1238, p. 13.

The fact that a majority of the capital stock of Stoebr & Sons, Inc., is owned by enemies or is represented by voting trust certificates belonging to enemies, does not convert the corporation into an enemy within the meaning of the statute. The corporation is an independent legal entity and its character is not affected by the status of the owners of even a majority of its stock.

Fritz Schultz, Jr., Co. v. Raimes & Co.,
99 Misc. Rep. 626, *affd.* 100 Misc. Rep.
697;

Society for the Propagation of the Gospel
v. Wheeler, 22 Fed. Cas. 58, 2 Gall.
105;

Bank of the United States v. Deveaux, 5
Cranch. 61;

St. Louis & S. F. Ry. Co. v. James, 161
U. S. 545;

Stumpf v. A. Schreiber Brewery Co., 242
Fed. Rep. 80;

Posselt v. D'Epard, 100 Atl. Rep. 893.

The use of the words "incorporated within any country other than the United States," as contained in Section 2, sub-division (a), of the Trading with the Enemy Act, disposes of any question as to the status of a corporation organized in the United States whose shareholders may be "enemies" within the definition of the act. This purpose was made very clear by the Assistant Attorney General Warren on the hearings before the Sub-Committee of the House of Representatives which formulated the statute. (*Huberich on Trading with the Enemy*, pp. 33-34.) He said:

"We have specifically abstained in the bill from attempting to go behind the corporate charter. If the corporation is an American corporation, then it can do business in this country. * * * In England they attempted to go behind the charter of an English corporation, and they attempted to hold that the English corporation, which was controlled by German stockholders, was an enemy within the purview of their Act, and they landed in inextricable confusion. * * * Here we have solved that by saying we will not go behind the corporate charter no matter how many German stockholders there may be."

The English decision to which Mr. Warren referred was unquestionably *Daimler Company, Ltd. v. Continental Tire and Rubber Company, Ltd., 2 App. Cas. (1916) 307*, which, as is shown by the authorities cited above, is inconsistent with the rule obtaining in our courts.

The fact that the Alien Property Custodian has undertaken to decide that these shares of stock belong to the Leipzig Company is without validity as to Stoehr & Sons, Inc. It was not within his power to render such a decision and to adjudicate upon the rights of this New York corporation. At all events, if the ownership of these shares of stock was vested, either legally or equitably, in Stoehr & Sons, Inc., an adjudication that they were the property of the Leipzig Company, attempted to be made by the Alien Property Custodian under Section 6 of the Trading with the Enemy Act, was *coram non judice*.

The Alien Property Custodian not having the power under the statute to seize property belonging to an American corporation, his acts of seiz-

ing the 14,900 shares and of seeking to sell them are nullities.

Bigelow v. Forrest, 9 Wall. 339;

Risley v. Phoenix National Bank, 83 N. Y. 318.

For a general statement of the purpose of the Trading with the Enemy Act, see Report of the Committee on Commerce of the Senate, to be found in Senate Documents of the Sixty-fifth Congress, First Session, No. 113; also pamphlet of hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on H. R. 4704, including the testimony of Mr. Warren, Assistant Attorney General.

VI.

In so far as the Alien Property Custodian undertook as against Stoehr & Sons, Inc., a New York corporation, and, therefore, not an enemy or an ally of an enemy, ex parte and without a legal proceeding based upon notice and a hearing or an opportunity to be heard in court, to take possession of the shares of stock of the Botany Worsted Mills belonging to Stoehr & Sons, Inc., and to determine that such shares belonged to the Leipzig Company or to any other enemy, his action was null and void and in violation of the due process of the Federal Constitution.

This proposition is so clear that it will be sufficient to cite a number of well-known cases in

which the doctrine was carefully elaborated. Two among them arose under the Confiscation Acts of 1861 and 1862. We refer to *McVeigh v. United States*, 11 Wall. 259, and *Windsor v. McVeigh*, 93 U. S. 274. The opinion of Mr. Justice Field in the latter case has become a legal classic.

To the same effect are the decisions in

Hovey v. Elliott, 167 U. S. 409;

Scott v. McNeal, 154 U. S. 34;

Central of Georgia Ry. v. Wright, 207 U. S. 127;

Londoner v. Denver, 210 U. S. 385;

City & County of Denver v. State Investment Co., 49 Colo. 244, 33 L. R. A., N. S., 395;

Roller v. Hall, 176 U. S. 398;

Coe v. Armour Fertilizer Works, 237 U. S. 413.

Chapman v. Phenix National Bank, 85 N. Y. 437, is likewise an interesting application of the principle. It also arose under the Confiscation Acts of 1861 and 1862.

In *American Exchange National Bank v. Palmer*, 256 Fed. Rep. 680, it was decided that a bill of interpleader might be maintained by an American bank indebted to a depositor who was an American citizen, the Alien Property Custodian having served a notice that the deposit was the property of an alien enemy and requiring payment of the indebtedness to be made to him. In the course of his opinion Judge Mayer recognized the importance of the constitutional safeguards which we are now discussing as applicable to the facts of that case. He said:

"But the reason for concluding that the bank deposit cannot be summarily disposed of goes deeper than a mere collocation of words. Let us start with a case of unliquidated damage. The Custodian in his investigation finds, let us assume, that citizen A, prior to the war, breached his contract for delivery of goods to enemy B. Enemy B had a cause of action against citizen A for damages and would have been entitled to recover. Can it be imagined that Congress, disregarding constitutional safeguards, would have empowered the Custodian to determine without a hearing that citizen A owed enemy B \$1,000 because, after investigation, the Custodian regarded that amount as representing the damage to which enemy B would have been entitled as against citizen A? Let us go a step further, and assume that citizen A had made and delivered his note to enemy B, but insisted that there were defenses to the note, and that he did not owe the sum represented by the note, and was not liable upon the note. Could the Custodian determine, without a hearing, that there was liability from citizen A to enemy B upon the note, and therefore that there was either money or property owing from citizen A to enemy B? Wherein does the case at bar differ in principles from these illustrations? As between the Custodian and the bank, the Custodian has assumed to decide the legal liability of the bank; while the amount on deposit is not in dispute, the very vital question as to who the creditor is still remains in controversy. Was it ever intended, in such circumstances, that an *ex parte* investigation of the Custodian could determine, as against a stranger to the investigation, that that stranger owed enemy B instead of citizen A?"

Attention is likewise called to the opinion of Mr. Justice Pitney in *Ochoa v. Hernandez*, 230 U. S. 139, where he pertinently said:

“Without the guaranty of ‘due process’ the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that charter (Coke, 2 Inst. 45, 50), and has been recognized since the revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term ‘due process of law,’ all authorities agree that it inhibits the taking of one man’s property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing.”

In *Watts vs. Unione Austriaica*, 24 U. S. 9, it was held that even alien enemies are entitled to defend before judgment can be entered and that with due regard to the “Trading with the Enemy Act” of October 6, 1917. In that case the Court took notice of the war and reversed the decree of the Court below on the ground that the alien enemy had no opportunity to defend and directed the proceedings to be stayed until the restoration of peace between the United States and Austria-Hungary. The Court cited *McVeigh vs. United States*, 11 Wallace (U. S.) 259, and *Windsor vs. McVeigh*, 93 U. S. 274; also *Hovey vs. Elliott*, 167 U. S. 409.

If judgment cannot be entered even against an alien enemy, without notice and an opportunity to be heard, how much stronger then is the case of one who has been deprived of his property and who is a citizen of the United States, residing therein.

But even though it may be admitted that an enemy in time of war is not entitled to a judicial hearing and determination before his property can be captured and confiscated, a citizen of the United States or an American corporation cannot be deprived of his or its property or of its possession or enjoyment by an executive or administrative order and without the orderly process of the law.

"To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. *Rees vs. Watertown*, 19 Wall. 107, 123. Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In *Stuart vs. Palmer*, 74 N. Y. 183, 188, the Court said: 'It is not enough that the owners may by chance have notice or that they may as a matter of favor have a hearing. The law must require notice to them and give them the right to a hearing and an opportunity to be heard.' It matters not, upon the question of the constitutionality of such a law, that the Assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority be done."

Coe vs. Armour Fertilizer Works, 237 U. S. 413.

The provision of Section 9 of the Trading with the Enemy Act is not a substitute for the constitutional guaranty of due process of law. It clearly refers to the case of a person not an

enemy or ally of an enemy who claims an interest, right or title in money or other property which has been lawfully seized by the Alien Property Custodian, or to whom a debt may be owing from an enemy or ally of enemy whose property has lawfully come into the possession of the Alien Property Custodian. It certainly was not intended to provide that the property of a citizen may be seized by the Alien Property Custodian, and that if so seized he may be deprived of the attributes of his property, (*People ex rel. Manhattan Savings Institution v. Otis*, 90 N. Y. 48), and relegated to a claim against the proceeds in the event, as in the present case, that the Alien Property Custodian should seek to sell that property. Such a seizure would in and of itself be a violation of the Constitution, since captures on land and water must necessarily refer to captures of property belonging to an enemy or the ally of an enemy.

In *American Exchange National Bank v. Palmer*, *supra*, it was contended on behalf of the Alien Property Custodian that the complainant's remedy was under Section 9. Judge Mayer, however, held that that section was not applicable, adding:

"This section was intended to cover and include property the title to which was in an enemy, and which had been transferred or paid to the Custodian, either voluntarily or following a requirement. It is the citizen's right in enemy's property in the Custodian's hands that is being considered. It is to prevent placing enemy property beyond the reach of American citizens or non-enemies, who may have a right or an interest in or a lien upon the property of an enemy in the Custodian's possession. The section was not

intended to include non-enemies owning property in the United States in which no enemy had an interest, and which therefore was not required to be reported or transferred to the Custodian. It is difficult to suppose that Congress intended that our citizens should divest themselves of title to their own property, give to it an enemy character, and then get it back under section 9."

There is nothing in the decision in *Miller v. United States*, 11 Wall. 268, that contravenes our position. All that was there held was that the enactment of the Confiscation Acts of 1861 and 1862 was a proper exercise of the war powers, and that the right of confiscation of the property of a public enemy exists as fully in the case of a civil war as it does when the war is foreign. The statutes there under consideration, however, expressly provided for notice and a hearing and an orderly proceeding in court before the property of even a public enemy could be condemned. The proceedings were *in rem* instituted in the name of the United States in the United States District Court, such proceedings as the statute required, conforming "as nearly as may be to proceedings in admiralty and revenue cases, and if said property whether real or personal shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto the same shall be condemned as enemy's property." There was no pretence that the property of a citizen or of a corporation of any of the States not in rebellion, not located within the enemy territory, could be constitutionally seized.

VII.

The contention that any title that might have accrued to the New York Company under the terms of the contract of February 20, 1917, became divested on the passage of the Trading With the Enemy Act, is not tenable. If the interpretation sought to be given to that act by the defendants is correct, then the act, in so far as it undertakes by its fiat to divest such title, constitutes a deprivation of property without due process of law.

Cooley's Constitutional Limitations 444.

Gilman v. Tucker, 138 N. Y. 190.

Embury v. Crocker, 3 N. Y. 511.

Cromwell v. McLean, 123 N. Y. 474.

Germania Savings Bk. v. Suspension Bridge, 159 N. Y. 362.

VIII.

The sale of the shares of stock belonging to the New York corporation, in the absence of an adjudication in a proceeding duly instituted and conducted in accordance with due process, threatened by the Alien Property Custodian, and the limitation of its eventual relief and remedy upon such sale to the net proceeds received therefrom by the Alien Property Custodian or by the Treasurer of the United States as provided by the Act of November 4, 1918, were likewise violative of due process.

By the Act approved on November 4, 1918, it was provided:

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered or paid over to the alien property custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, *and in the event of sale or other disposition of such property by the alien property custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the alien property custodian or by the Treasurer of the United States.*"

The remedy to which reference is made is claimed by the Government to be that set forth in Section 9 of the Trading with the Enemy Act, which was further amended on July 11, 1919, subsequent to the institution of this action and after this suit was at issue.

The Alien Property Custodian having determined *ex parte* that these shares of stock belong to the Leipzig Company, by similar *ex parte* proceedings determined that they be sold, with the idea of relegating the New York Company to the proceeds of such sale should it eventually establish its ownership of the shares. The effect of such a sale would necessarily be to change the character of the property of the New York Company in the shares. As the owner of the shares it objected to such a sale. It desired to retain its property in its present form, namely, as a controlling interest in a successful industrial corporation, one described by appellees as being unique, the leading manufactory in the industry in which it is engaged within the United States, and possibly in the world. If these shares of stock were sold, as threatened by the Alien Property Custodian, then the nature of the property of the

New York Company in these shares would be completely changed. In lieu of an ownership of shares it would merely be the ownership of the net proceeds, if any, realized on the sale, in excess of the amount to be paid to the Leipzig Company for the shares.

The sale as advertised was to be one in bulk of the majority of the shares in the Botany Worsted Mills. All aliens, including British, Canadian, French, Italian, Spanish, Scandinavian subjects, would, under the terms of the statute and the conditions of the sale, be prohibited from bidding at the sale, as would any American corporation whose stock is alien-owned. From the very nature of things, therefore, competition would be limited. In all probability it would only be the competitors of the Botany Worsted Mills, the principal of whom is the American Woolen Company—colloquially known as the Woolen Trust—that would be likely to bid at such a sale. There would be a certainty that, with this limited competition, the price realized for the shares of stock would be greatly less than their real value.

If, therefore, the New York Company were eventually limited to the recovery of the net proceeds realized upon such a sale in excess of the amount payable to the Leipzig Company, whose equity has been seized by the Alien Property Custodian, it would necessarily follow that the New York Company would be deprived of its property in these shares without due process of law. Its rights reside in the shares. It cannot be compelled to accept a substitute for them, or to speak more accurately, to take the chances of the possible realization of something which may or may not be a substitute therefor. The proceedings sought to be restrained are an attempt to dis-

pose of those shares *in invitum* and to give to the New York Company, in lieu of such ownership, a mere shadow of what before the sale constituted its property right. The latter was substantial. The substitute may prove to be of the most evanescent character.

Had the property seized been real estate located in New York City, and had the Alien Property Custodian attempted to sell it, subject to a mortgage, at a time when real estate values were depressed, and had the owner been ultimately adjudged not to have been an enemy or the ally of an enemy but were nevertheless sought to be relegated "for relief and remedy" solely to the net proceeds of the sale less the amount of the mortgage, could there be any doubt that such a sale would be in violation of the owner's constitutional right of property?

If Section 9 is to be interpreted as authorizing such a sale as that which is now sought to be restrained, where the property belongs to an American corporation, and to limit the owner to such sum as the Alien Property Custodian, who had no right to seize it under the statute or under any rule of law applicable, may realize, then what becomes of due process of law?

The power of Congress conferred by Article I, Section 8, paragraph 11, to make rules concerning captures on land and water, has no relevancy to the capture in the United States of the property of an American corporation domiciled and carrying on its business in the United States. When his property is sought to be taken, even though it be in time of war, such taking must be in conformity with the provisions of the Fifth Amendment to the Constitution. The latter even controls the exercise of the war power.

In *Ex parte Milligan*, 4 Wall. 2, it was held that neither the President nor Congress nor the judiciary can disturb any one of the safeguards of constitutional liberty incorporated into the Constitution, except in so far as the right is given to suspend in certain cases the privilege of the writ of *habeas corpus*.

Ex parte Orozco, 201 Fed. Rep. 109, 117.

Ex parte McDonald, 49 Mont. 467, 471.

That doctrine has never been departed from and is applicable to just such a case as this.

This seizure does not come within the principle of the cases relied on by the defendants, to the effect that where property is taken for a public use it is not necessary to pay for it prior to its seizure so long as provision is made for compensation. It is not pretended that this seizure was for a public use within the constitutional meaning of that term.

But even if it had been, there was no provision in the statute for the just compensation which is required to be paid wherever private property is taken for public use. All that Section 9 purports to do is to permit a claimant who is not an enemy or ally of an enemy, who has an interest in property conveyed, transferred, assigned and delivered to the Alien Property Custodian under the Trading with the Enemy Act, to file his claim with the Alien Property Custodian to the property, if it continues to be in the possession of the Custodian, or to the proceeds of the property if they are paid to the Treasurer of the United States. There is no provision to the effect that, in the event of a sale, the owner of the property is to be paid the difference between the amount realized and the value of the property sold, or

any consequential loss that may have been sustained by reason of such seizure and sale.

On the contrary, as we have seen, the statute expressly negatives such a purpose, for it declares as distinctly as language can, that "the sole relief and remedy of any person having any claim to any * * * property" theretofore or thereafter "conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian" shall be that provided by section 9. At the risk of repetition we emphasize the concluding words of the amendment of November, 1918, "*and in the event of sale or other disposition of such property by the Alien Property Custodian shall be limited and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.*"

The law is, therefore, confiscatory in its operation. Consequently the Constitution precludes such a sale as that contemplated and which it is sought by this suit to restrain.

IX.

There having been no adjudication by the President, after investigation, that any of the shares in controversy belong to an enemy or ally of an enemy the act of the Alien Property Custodian, condemning them as enemy-owned, was without jurisdiction and void.

The demands served by the Alien Property Custodian clearly negative Presidential action. No document is presented which assumes to represent

a determination by the President as to the ownership of the shares of stock in question. A. Mitchell Palmer and Francis P. Garvan have made demands which are in effect as follows (*Rec. p. 271 and pp. 256 to 270*):

"I A. Mitchell Palmer (or Francis P. Garvan), Alien Property Custodian, duly appointed, qualified and acting under the provisions of an Act of Congress known as the 'Trading with the Enemy Act,' approved October 6, 1917, and the amendments thereto and the proclamations and Executive Orders issued in pursuance thereof, by virtue of the authority vested in me by said Act and by said Executive Orders, after investigation do determine that.....whose address isis an enemy (not holding a license granted by the President) within the purview of said Act as amended and said proclamations and Executive Orders.

"And as such Alien Property Custodian, after investigation, I do further determine that all those certain rights, privileges and benefits created in favor of and granted to Kammgarnspinnerei Stoehr & Co. Aktiengesellschaft, said enemy) by the terms of that certain contract entered into between said Stoehr & Sons, Inc., and said enemy dated the 20th day of February, 1917, with respect to certain 14,900 shares of the common capital stock of Botany Worsted Mills, a copy of which contract is attached hereto marked Exhibit A belong to or are held by you for, on account of, on behalf of or for the benefit of, said enemy Kammgarnspinnerei Stoehr & Co. Aktiengesellschaft.

"I as such Alien Property Custodian hereby seize every such right * * * and as such Alien Property Custodian, I do hereby require that you shall convey, transfer, assign and deliver to me as Alien Property Custodian

dian, to be by me held, administered and accounted for as provided by law, * * *

Witness my hand and seal of office this
day of _____, 1918.

A. MITCHELL PALMER,
(or FRANCIS P. GARVAN)

Alien Property Custodian."

The authority of the Alien Property Custodian in the premises must be sought in the Trading with the Enemy Act. Most careful examination discloses that there is no provision in that act which empowers the Alien Property Custodian to make a determination as to the character of the property sought to be captured. On the contrary, Section 7, subdivision (c), clearly indicates that it is the President who is to make such investigation and determination. That clause reads:

"(c) If the *President* shall so require, any money or other property owing or belonging to or held for, by, on account of, or for the benefit of an enemy or ally of enemy, not holding a license granted by the President hereunder, *which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian.*"

This subdivision of the act was amended by the act making appropriations to supply deficiencies in appropriations for the fiscal year ending June 30, 1919, approved November 4, 1918. As so amended it reads as follows:

"(c) If the *President* shall so require, any money or other property including (but not thereby limiting the generality of the above) patents * * * and rights and claims of every character and description owing or belonging

to or held for, by, or on account of, or on behalf of or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, *which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered or paid over* to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this act. * * * Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association or company or trust it shall be the duty of the corporation, association or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest, to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its or his or their books in the name of any person or persons, or held for or on account of, or on behalf of, or for the benefit of *any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interests to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.*"

Section 9 of the Trading with the Enemy Act was amended on July 11, 1919, and as so amended contains the provision:

"Provided, however, that in respect of all property heretofore determined by the *President* to be held, for, by, on account of or on

behalf of, or for the benefit of a person who was an enemy or ally of enemy, if the *President*, after further investigation, shall determine that such person was an enemy or ally of enemy solely by reason of residence in that portion of the territory of any nation associated with the United States in the prosecution of the war which was occupied by the military or naval forces of Germany or Austria-Hungary, or their allies, and that such person is a citizen or subject of such associated nation, then the President, without any application being made therefor, may order the payment, conveyance, transfer, assignment or delivery of such money or other property held by the Alien Property Custodian, or by the Treasurer of the United States, or of the interest therein to which the *President* shall determine such person entitled, either to the said enemy or to the person by whom said property was conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian."

On October 12, 1917, by Executive Order of the President, it is provided as follows:

"XXIX. I hereby vest in an alien-property custodian, to be hereafter appointed, the executive administration of all the provisions of section 7 (a), section 7 (c), and section seven (d) of the trading with the enemy act, including all power and authority to require lists and reports, and to extend the time for filing the same, conferred upon the President by the provisions of said section 7 (a), and including the power and authority conferred upon the President by the provisions of said section 7 (c), to require the conveyance, transfer, assignment, delivery or payment to himself, at such time and in such manner as he shall prescribe, of any money or other properties owing to or

belonging to or held for, by or on account of, or on behalf of, or for the benefit of any enemy or ally of an enemy, not holding a license granted under the provisions of the trading with the enemy act, *which, after investigation, said alien-property custodian shall determine is so owing, or so belongs, or is so held.*"

"XXXIII. The alien property custodian, to be hereafter appointed, is hereby authorized to take all such measures as may be necessary or expedient, and not inconsistent with law, to administer the powers hereby conferred; and he shall have the power and authority to make such rules and regulations not inconsistent with law as may be necessary and proper to carry out the provisions of said section 7 (a), *section 7 (c), section 7 (d), section 8 (a), and section 8 (b), conferred upon the President by the provisions thereof and by the provisions of section 5 (a),* said rules and regulations to be duly approved by the Attorney General."

In an Executive Order of the President dated February 26, 1918, there are contained the following provisions:

"Any requirement made by the Alien Property Custodian pursuant to Section 7, subsection 'c' of the 'Trading with the Enemy Act' may be known as and called a demand and will be hereafter referred to as a demand."

"The Alien Property Custodian may make demand for the conveyance, transfer, assignment, delivery, and payment of any money or other property owing or belonging to or held for, by, on account of, or on behalf of or for the benefit of an enemy not holding a license granted by me or in the exercise of my power and authority, which the Alien Property Custodian after investigation shall deter-

mine is so owing or so belongs or is so held, together with every right, title, interest, and estate of the enemy in and to such money or other property and every power and authority of the enemy thereover, including (but without limiting the generality of the foregoing—the power and authority to affirm, ratify, approve, revoke, repudiate or disapprove, in whole or in part, and at any time or times, any power, agency, trust or other relation at the time existing * * *.”

“The Alien Property Custodian may appoint and clothe with necessary power and authority such agents, bailees, and attorneys in fact as he may find to be necessary or proper to carry out the provisions of the ‘Trading with the Enemy Act’ and the executive orders, rules and regulations heretofore, hereby, and hereafter made, and prescribe the duties and fix the compensation of such agents, bailees, and attorneys in fact; and any depositary designated by the Alien Property Custodian may be appointed as such agent, bailee or attorney in fact. And the Alien Property Custodian may require bonds of such agents, bailees and attorneys in fact and fix the penalty and conditions thereof.”

“The Alien Property Custodian may nominate persons who may, when duly elected or appointed, serve as directors, officers or employees of any corporation whose corporate stock or shares, in whole or in part, are owing or belonging to, or are held for, by, on account of, or on behalf of or for the benefit of an enemy.”

It is manifest from the terms of the statute that the action of the President looking to the capture of the enemy-owned property is judicial in its character. The conveyance, transfer, assignment and delivery of such property to the

Alien Property Custodian can only be required in the event that "the President *after investigation shall determine*" that such property belongs to or is held for, by, on account of, or on behalf of, or for the benefit of an alien enemy or ally of enemy. A determination made "after investigation" denotes the exercise of judgment. It is not an arbitrary act, or one which is merely perfunctorily performed. It involves the pronouncement of judgment upon facts, not arbitrarily, but after investigation.

Such being the nature of the duties imposed upon the President, they cannot be delegated. Functions expressly imposed upon him cannot be performed by another. The seizure of property claimed to be enemy-owned must be the act of the President, and not that of any other official.

In this respect the case comes within the principle laid down in *Runkle v. United States*, 122 U. S. 543. There it was provided by the Articles of War "for the government of the armies of the United States":

"Neither shall any sentence of a general court martial, in time of peace, extending to the loss of life, or the dismissal of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution until after the whole proceedings shall have been transmitted to the Secretary of War to be laid before the President of the United States, for his confirmation or disapproval, and orders in the case."

It was held that the action required of the President by this article was judicial in its character, and that his approval must be authenticated in a way to show, otherwise than argumentatively,

that it is the result of his own judgment and not a mere departmental order which may or may not have attracted his attention, and that the fact that the order was his own must not be left to inference only. Consequently that, until the President has acted in the manner required by the article, a sentence by a court martial of dismissal of a commissioned officer from the service in time of peace was inoperative. In the course of his opinion Chief Justice Waite said (p. 557) :

"There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. * * * Here, however, the action required of the President is judicial in its character, not administrative. As Commander in Chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the members of the court martial itself. He may call others to his assistance in making his examination and in informing himself as to what ought to be done, but his judgment, when pronounced, must be his own judgment and not that of another. And this because he is the person, and the only person, to whom has been committed the important judicial power of finally determining upon an examination of the whole proceedings of a court

martial, whether an officer holding a commission in the army of the United States shall be dismissed from service as a punishment for an offense with which he has been charged, and for which he has been tried. . . .

Coming then to the order on which reliance is had to show the approval of President Grant, we find it capable of division into two separate parts, one relating to the approval of the proceedings and sentence, and the other to the executive clemency which was invoked and exercised. It is signed by the Secretary of War alone, and the personal action of the President in the matter is nowhere mentioned, except in the remission of a part of the sentence. There is nothing which can have the effect of an affirmative statement that 'the whole proceedings' had been laid before him for action, or that he personally approved the sentence. . . .

Under these circumstances, we cannot say it positively and distinctly appears that the proceedings of the court martial have ever in fact been approved or confirmed in whole or in part by the President of the United States, as the Articles of War required, before the sentence could be carried into execution. . . . Such being our view of the case, it is unnecessary to consider any of the other questions which were referred to the Court of Claims. Neither do we decide what the precise form of an order of the President approving the proceedings and sentence of a court martial should be; nor that his own signature must be affixed thereto. But we are clearly of opinion that it will not be sufficient unless it is authenticated in a way to show otherwise than argumentatively that it is the result of the judgment of the President himself, and that it is not a mere departmental order which might or might not have attracted his personal attention. The fact that the order was his own should not be left to inference only."

In *Truitt v. United States*, 38 Ct. Cl. 398, the Court considered an act which provided that the President may assign officers to staff duty "in his discretion." It was held that an order issued by direction of the Secretary of War and by command of Major General Miles was not an order of the President. The Court said:

"Even if we were to assume that the President could have acted in the premises through General Miles there is nothing in the order or in the record * * * to show that the President directed the issuance of the order. The order on its face purports to have been issued by direction, not of the President, but of the Secretary of War. So there is nothing to show that the President exercised his discretion in the assignment of the claimant to staff duty."

There is nothing in the decision of *Kahn v. Garcon*, 263 Fed. Rep. 909, that overcomes the effect of these decisions. If there was such a purpose, it is contrary to the principle laid down in *Runkle v. United States*, *supra*. Nor does it give effect to the explicit language of the Trading with the Enemy Act.

That case involved a proceeding against property admittedly belonging to enemies, and not against property belonging to a citizen of the United States residing here and carrying on his business in the State of New Jersey. The proposition that we are now discussing was entirely overlooked. The point raised as to the capture of the property which was the subject-matter of the proceeding was that the demand was not signed by the Alien Property Custodian personally. In answer to that proposition the Court referred to Section 3a of the Executive Order of

February 26, 1918, and called attention to the fact that that section authorized a delegation by the President to the Alien Property Custodian of his own power to delegate. The terms of Section 7c of the Trading with the Enemy Act and the provision relative to the so-called power of the President to act through designated officers were in no way referred to or considered. The opinion of the Court in that case cannot, therefore, be regarded as an adjudication on the proposition now under discussion.

The remark that the duty exercised by the Alien Property Custodian was executive and not judicial, is in direct conflict with what was actually decided in *Runkle v. United States*, *supra*. To say that a *determination* made after investigation is an executive and not a judicial act, is to misconceive the essential elements of the act performed. To make a determination necessarily calls for the exercise of the judicial faculty. To make such a determination after an investigation shows clearly that the act is not ministerial, but judicial. The fact that the act itself constitutes one of sequestration, and may become the basis of actual confiscation, demonstrates that the person performing the function confided in the President by the statute is not acting perfunctorily or as a mere automaton, is not making a determination which is arbitrary, but is in duty bound to render a decision based on reason. If this were not so, then the requirement that there be an investigation and a determination might as well have been eliminated. A demand that the property sought to be captured is enemy-owned might then be made with respect to any and all property within the boundaries of the United States, by whomsoever possessed and by whomsoever actually owned.

The statutory requirement cannot, however, be thus looked upon as naught. It is jurisdictional. Failure to comply with such jurisdictional requirement by the persons named and in the manner specified in the statute constitutes the act an absolute nullity.

That the requirements of the Trading with the Enemy Act are jurisdictional is established by a multitude of decisions, of which *Risley v. Phoenix Bank*, 83 N. Y. 318, and *Chapman v. Phoenix Bank*, 85 N. Y. 437, are well-known examples. The leading case on the subject, however, is *Thompson v. Whitman*, 18 Wall. 457, where it was held that the seizure of a vessel for unlawfully raking clams in violation of the statute, which authorized proceedings for her forfeiture in the county in which seizure was made, was void where it was found that the seizure was not made in the same county although the decree of condemnation recited that it was.

The opinion in *Scott v. McNeal*, 154 U. S. 47, collates many other pertinent authorities.

Nor is the case of *Kohn v. Joseph and Jacob Kohn, Inc.*, 264 Fed. Rep. 253, in any way applicable to the point now under consideration. The Provisions of the Trading with the Enemy Act now under discussion were in no manner considered; nor was any question raised as to the validity of the demand made. The point solely discussed was what the effect of a demand would be.

It will be claimed that Section 5 of that statute permits the President to delegate his powers under the act. Reference is made to the clause in which it is announced "and he (the President) may make such rules and regulations not inconsistent with law, as may be necessary and proper to carry out the provisions of this act; and the

President may exercise any power conferred by this act *through such officer or officers as he shall direct.*"

It is to be observed that this is not a grant of power to the President to delegate his functions. He is not permitted to abdicate the duties which are expressly imposed upon him. In fact the very clause to which reference is made contemplates that the President is to exercise the power or authority conferred by the act. It is his exercise of power or authority to which reference is made. Upon him rests the responsibility for any action taken. He is merely permitted to call into requisition to enable him to exercise his power and authority such officer or officers as he shall direct. It is he who acts "through such officer or officers." But nevertheless it is he who is to act. In the language of Chief Justice Waite in *Runkle v. United States*, *supra*, he may call others to his assistance in making his examinations and in informing himself as to what ought to be done, but his judgment when pronounced must be his own judgment and not that of another.

It certainly was not intended by Congress that when the President was called upon to determine a fact after investigation, he could direct any other officer of the Government to exercise his powers and to make the adjudication called for by Section 7c. He would not be exercising his power and authority through the Alien Property Custodian if the latter, in an instrument which does not as much refer to the President, declares that he, the Alien Property Custodian, has determined that the property sought to be seized is enemy-owned. That would constitute action by the Alien Property Custodian, but not by the

President. When it is deliberately declared that the President shall perform the important function of making a determination after investigation, it certainly does not carry out the purposes of the legislation if a subordinate official exercises the power. If the Alien Property Custodian may thus assume the Presidential functions, then any clerk in his office might with equal right do so if he performs a service in connection with the investigation which must precede the determination which the statute requires to be made before there can be a seizure of enemy-owned property.

It is also significant that when sub-section (c) of Section 7 was amended on November 4, 1918, more than a year after the enactment of Section 5 of the act, there was not only a re-enactment of that clause of the original act which refers to a determination of the President after investigation, but in the third paragraph of the amendment, which refers specifically to property consisting of shares of stock or other beneficial interest in any corporation held for or on account of or on behalf of or for the benefit of an enemy or ally of enemy, the persons entitled to such stock were expressly referred to as "any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall be required to be conveyed, transferred, assigned or delivered to the Alien Property Custodian or seized by him." This clearly called for Presidential action and not for action by another officer.

That this must have been the intention of Congress is further evident from the fact that the clause just quoted refers to "property required to be conveyed * * * or delivered to the Alien

Property Custodian or seized by him." It would be most extraordinary if the Alien Property Custodian, to whom delivery is to be made or who is to seize the property, should be permitted to make the determination which results in placing into his possession property claimed to be enemy-owned. He would thus be made not only the investigator and the judge, but also the executioner. Such a situation would be contrary to the first elements of propriety and justice.

X.

Independently of the impairment of the constitutional rights of Stoehr & Sons, Inc., the proposed sale would likewise violate the true intent and meaning of the Trading With the Enemy Act.

As his name implies, the Alien Property Custodian is intended to be a mere bailiff. The property seized by him is to be held until the termination of the war. Under Section 12 of the act it is provided:

"After the end of the war any claim of any enemy or of any ally of enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States treasury, shall be settled as Congress shall direct."

Until Congress shall so direct there can be no confiscation even of the property of an enemy or of an ally of an enemy. Until that time the money or property received by the Alien Property Custodian

todian is to be held by him or deposited in the United States Treasury. *A fortiori* it would be monstrous to believe that the property of one who is neither an enemy nor an ally of an enemy may not only be seized, but may be disposed of and its character changed at the mere will of the Alien Property Custodian.

Section 12 of the Trading with the Enemy Act as passed on October 6, 1917, provided in the fourth paragraph:

"The alien property custodian shall be vested with all the powers of a common law trustee in respect of all property, other than money, which shall come into his possession in pursuance of the provisions of this Act, and, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, may manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights which may be or become appurtenant thereto or to the ownership thereof, if and when necessary to prevent waste and protect such property and to the end that interests of the United States in such property and rights or of such person as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded. It shall be the duty of every corporation in incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The alien

property custodian shall forthwith deposit in the Treasury of the United States, as heretofore provided, the proceeds of any such property or rights so sold by them. * * *

Then follows the clause above quoted as to the ultimate determination by Congress of the claims of an enemy or an ally of an enemy of property seized.

By the amendment of Section 12 contained in the Deficiency Appropriation Act approved March 28, 1918, it was again provided that:

"The alien property custodian shall be vested with all of the powers of a common law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered or paid over to him in pursuance of the provisions of this act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: *Provided, that any property sold under this act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine.*

"*Provided further, That when sold at public sale, the alien property custodian upon the*

order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. *Any person purchasing property from the alien property custodian for an undisclosed principal, or for resale to a person not a citizen of the United States, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than \$10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him."*

In *American Exchange National Bank v. Palmer, supra*, it was argued on behalf of the Alien Property Custodian, as it has been argued here, that the Trading with the Enemy Act was intended not only to weaken the arm of the enemy by depriving him of resources, but also to strengthen the arm of the captor by furnishing means for the prosecution of the war. Judge Mayer was not impressed by that idea, for he said:

"Nowhere in the act is there evidence of any legislative intent that the purpose of seizing or taking enemy property under the

act is to furnish our government with means to prosecute the war. The final disposition of such property as has been or will be taken under the act will be governed by treaty arrangements or congressional legislation or both. In a broad sense, the United States is a trustee to hold enemy property taken under the act until such time as the United States, in orderly course, shall determine the final disposition thereof. It is fair to assume that any treaty will safeguard the rights of American citizens whose property has been seized in enemy countries, and therefore that the provisions of such treaty will, in this respect, be reciprocal. Undoubtedly resources captured under this act could, as an incident, be used by the United States in the course of its prosecution of the war; but the fundamental purpose of the act was to prevent the enemy from having the advantage of such resources as might be susceptible of capture under the act."

In view of the fact that the Alien Property Custodian is merely vested with the powers of a "common law trustee," it is believed that no substantial change has been wrought by this amendment in the provisions as originally enacted in Section 12 of the Trading with the Enemy Act. The Alien Property Custodian merely receives the property seized for preservation and safeguarding. The power of disposition would necessarily be confined to the sale of perishable property and for the purpose of preventing waste. In view of the fact that the money or property received and held by the Alien Property Custodian is to be subject to the ultimate determination as to its disposition by Congress, it would involve a manifest incongruity if this provision were to be interpreted as giving to the Alien Property

Custodian the right to dispose of any property coming into his possession irrespective of the necessity for such disposition in order to prevent waste and deterioration.

In the present case there is no possible occasion for such sale. The business of the Botany Worsted Mills has been prosperous. It has accumulated a large surplus. The property is in excellent condition. The prospects of a lucrative business are encouraging. Although the war is not literally at an end, it is merely because the United States has not as yet entered into a treaty of peace with Germany, as have the Powers associated with us in the war. The execution of some kind of a treaty may reasonably be expected at an early day. There is therefore no reason for the sale of these shares of stock at this time. Nor have the defendants vouchsafed a reason. To sell this valuable property belonging to an American corporation at this time and under the circumstances disclosed, would be inexcusable.

One who holds property in trust is not vested with arbitrary power. If under the terms of his trust he is permitted to sell the property held in trust, his discretion is not unfettered. He cannot by virtue of that power sell at an unreasonable time, or upon unreasonable conditions, or under circumstances which would result in the sacrifice of the trust property.

That property captured as a prize should be preserved *in specie* until the right to confiscate or requisition it has been judicially determined, was adjudicated in *The Zamora*, L. R. 2 App. Cas. (1916) 77. There a quantity of copper was captured on board of a Swedish steamship and was brought into the Prize Court on the ground that the cargo had an enemy destination or was enemy

property. The ship and cargo were taken into the custody of the marshal pending the proceedings. Under an Order in Council the British Government sought to requisition the cargo upon an undertaking to pay the appraised value into court. It was held that the inherent power of the Prize Court to sell or release property in its custody pending adjudication was confined to cases in which the preservation of the property was impossible or difficult; that under international law a belligerent power can only requisition vessels or goods in the custody of its Prize Court, subject to the limitation (a) that the property is urgently required for use in connection with the defense of the realm, the prosecution of the war, or other matters involving national security; (b) that there was a real question for trial, so that it would be improper to order the release, and (c) that the right to requisition under the particular circumstances is judicially decided by the Prize Court as exercisable.

XI.

The complainant, as a minority stockholder of Stoehr & Sons, Inc., has the right to maintain this action in his representative capacity in view of the fact that the directors of that corporation are the nominees of the Alien Property Custodian, who, by reason of his possession of a majority of the stock, controls the affairs of that corporation.

At the time this action was commenced the directors of that corporation were Mr. Garvan and Mr. Duvall, who were subordinates of Mr.

Palmer, the Alien Property Custodian, and Mr. Kieffer, who was associated with Mr. Quinn, the latter being designated by the Alien Property Custodian as the counsel of Stoehr & Sons, Inc., and of the Botany Worsted Mills. In view of the animosity to the New York Company manifested by Mr. Quinn, in the course of his argument, it is quite evident that an application by the complainant to the Board of Directors of Stoehr & Sons, Inc., named by the Alien Property Custodian, requesting them to bring an action against their creator, would have been a mere farce.

Mr. Wallace, the fourth of these directors, although a prominent banker, owed his office to the sole act of the Alien Property Custodian.

Judge Hand indicated that he had no doubt of the propriety of appellant's procedure.

The fact that the complainant owned 44 shares only of the capital stock of the corporation does not under the authorities affect his right to maintain this action. *Dodge v. Woolsey*, 18 How. 331, 2 Machen's Modern Law of Corporations §§1165, 1166.

XII.

The Alien Property Custodian having elected to seize the cause of action of the Leipzig Company against the New York Company for the unpaid purchase price for the 14,900 shares of the Botany Worsted Mills (Defendant's Ex. L-1, Rec. p. 271), he thereby precluded himself because of the election made to seize the 14,900 shares of stock transferred to the New York Company, his election to recognize the transaction as a sale being inconsistent with the position taken by him in the present case.

The appellees are thus seeking to blow hot and cold at the same time. They assert that the New York Company is indebted to the Leipzig Company for the purchase price of a consummated sale, and at the same time claim that there has been no sale. The effect of this dual and inconsistent attitude is to deprive the New York Company of the ability to use the shares of stock for the purpose of financing their payment. In this view the case presents, in most aggravated form, the evils attendant upon the pursuit of inconsistent remedies, and affords impregnable moral support for the application of the doctrine of the election of remedies.

Among the many cases that may be cited under this head we select the following:

Fowler v. Bowery Savings Bank, 113 N. Y. 450.

Whalen v. Stuart, 194 N. Y. 505.

Moller v. Tuska, 87 N. Y. 166.

Bach v. Tuch, 126 N. Y. 53.

Morris v. Rexford, 18 N. Y. 352.

Acer v. Hotchkiss, 97 N. Y. 395.

Cowrow v. Little, 115 N. Y. 387.

Terry v. Munger, 121 N. Y. 161.

Bobbs-Merrill Co. v. Straus, 210 U. S. 339.

XIII.

The claim that appellant cannot maintain this suit in his representative capacity because of the provisions of section 9 of the Trading With the Enemy Act or because of alleged non-compliance with the XXVII Equity Rule, proceeds on an erroneous theory.

So far as the Equity Rule is concerned, its requirements have been strictly complied with. It is alleged in the first paragraph of the bill of complaint that Stoehr & Sons, Inc. "is and ever since February 17, 1917, has been a corporation duly organized by and under the Laws of the State of New York." In the third paragraph it is shown that since February 17, 1917, complainant has continuously been and at the time of the commencement of the suit was the lawful owner and holder of record of forty-four shares of the capital stock of Stoehr & Sons, Inc. The grievances which are sought to be redressed occurred subsequent to that date. Hence, in the language of the rule, it is shown "that the plaintiff was a shareholder at the time of the transaction of which he complains."

Within the authorities, including *Hawes v. Oakland*, 104 U. S. 450, the fact that the four directors

of Stoebr & Sons, Inc., were the nominees of the Alien Property Custodian, two of them being at the time of their designation his official assistants, and one of them being in the employ of Mr. Quinn, who was designated by the Alien Property Custodian as the attorney for the Botany Worsted Mills and of Stoebr & Sons, Inc., and whose extreme partisanship has been disclosed throughout the trial, rendered it unnecessary to apply to these directors for relief before resort could be taken to the courts. The Alien Property Custodian had seized practically all of the shares of stock of Stoebr & Sons, Inc. He had caused these shares to be transferred into his own name. He therefore controlled the corporation, and the directors held their positions subject to his absolute will.

It is an insult to one's intelligence to intimate that these directors would have listened, even with patience, to a request that they should institute suit against their creator, the Alien Property Custodian, for the purpose of enjoining him from carrying out his order that the 14,900 shares of the Botany Worsted Mills be sold. The law does not require the doing of a vain or useless act. Consequently, in the circumstances disclosed, an application to the board of directors to commence such an action was as unnecessary as would have been a request to the Alien Property Custodian to sue himself.

Doctor v. Harrington, 196 U. S. 579;
*Delaware & Hudson Co. v. Albany & S.
 R. R. Co.*, 213 U. S. 435.

As to the claim that Section 9 of the Trading with the Enemy Act precludes the maintenance of such an action as the present, we reply that

it does not even undertake to do so. It does not seek to interfere with the general equity jurisdiction of the courts when invoked by one who has a standing in court. An enemy is prohibited by Section 7, subdivision (b), paragraph 3, from prosecuting any suit or action at law or in equity in any court within the United States prior to the end of the war, except as provided in Section 10, which is not applicable here. There is, however, no such prohibition against a citizen of the United States or a corporation organized under the laws of any of the States.

While Section 9 purports to afford some kind of remedy to a person not an enemy or ally of enemy, as has been herein shown, it is not such a remedy as is adequate under the circumstances. At all events it is not an exclusive remedy, and in so far as the constitutional rights of the complainant and of the New York Company are concerned it cannot be urged as a bar to any resort to the equity powers of this Court.

Moreover, had it even been attempted to deprive the appellant of the right to maintain such an action as the present, for the protection of its constitutional rights, it would have been a nullity.

Ex parte Young, 209 U. S. 123.

XIV.

The contention that the agreement of February 20, 1917, is void and unenforceable because Hans E. Stoehr, who executed it on behalf of the Leipzig Company, was the president of and interested in the New York Company, is not one that lies within the competency of the defendants to make.

Although Hans E. Stoehr acted for the Leipzig Company, of whose supervisory council he was a member, the contract was executed on behalf of the New York Company by George E. Rohlig, Vice-President. But even if Hans E. Stoehr had acted for the latter company and by doing so acted inconsistently with his fiduciary obligation to the Leipzig Company, that fact would merely have made the contract voidable at the latter's election. It did not make the contract a nullity. In the absence of action taken by the Leipzig Company to avoid the agreement, it was in every way effective and binding upon it.

The case principally relied upon by the defendants, *Marsh v. Whitmore*, 21 Wall. 178, concedes the correctness of this proposition. Mr. Justice Field said (*p.* 183):

“Most undoubtedly that sale was voidable. The character of vendor and that of purchaser cannot be held by the same person.
* * *

“And were there nothing more in the case than the fact of the sale and purchase, complainant would be entitled to call the defendant to account for the full value of the bonds. But unfortunately for him there is more in the case. He has adopted and approved of

the transaction. * * * Had he at once denied the validity of the transaction, or by any declaration or proceeding indicated dissatisfaction with it, or even refrained from expressions of approval, he would have stood in a court of equity in a very different position. * * * At any rate the claim now presented is a stale one. The complainant does not set forth specifically any grounds which could have constituted impediments to an earlier prosecution of his suit."

Because of the complainant's laches equitable relief was denied in the case cited. If the transaction had been absolutely null and void *ab initio* laches would obviously not have debarred complainant's right to relief.

In 3 *Pomeroy's Equity Jurisprudence*, §§ 1077, 1078, it is similarly laid down that a contract susceptible to the criticism in which the appellees indulge is voidable and not void.

See also:

Twin Lick Oil Co. v. Marbury, 91 U. S. 592.

Haywood v. Elliott, 96 U. S. 618.

Indianapolis Rolling Mill Co. v. St. Louis R. R. Co., 120 U. S. 60.

Hammond v. Hopkins, 143 U. S. 250.

Hoyt v. Latham, 143 U. S. 566.

Munson v. S. G. & C. R. R. Co., 103 N. Y. 58, likewise relied upon by the appellees, was an action brought by a trustee, who had in his individual capacity entered into a contract for the purchase of property belonging to the *cestui que trust*, for specific performance of the contract, which still remained executory. Doubtless the defendant could avail itself of the right of avoid-

ance. It was in this sense that Judge Andrews referred to the contract as repugnant to the rule "which invalidates all contracts made by a trustee or fiduciary, in which he is personally interested, *at the election of the party he represents.*" It was neither held nor intimated that the contract was void, and therefore a nullity.

In *Continental Securities Co. v. Belmont*, 206 N. Y. 7, the suit was not even brought for a rescission of the contract, but merely for an accounting. By that very fact it was recognized that the title to the stock and bonds which were the subject-matter of the litigation had passed. It was merely attempted to require the defendants to account for any benefits received by them or injury done to the corporation by reason of the alleged breach of trust.

The Leipzig Company has not repudiated the instrument. It is our contention that the agreement was entered into with its authority. The Alien Property Custodian, who is a mere custodian or common law trustee of the property seized by him, does not represent the Leipzig Company and cannot, therefore, avoid or annul the transaction evidenced by the agreement. He does not stand in the shoes of the Leipzig Company. He is not its successor. He is dealing merely with a specific item of property the equitable title of which is vested in the New York Company, but which he claims in reality belongs to the Leipzig Company. He cannot by his act in repudiation of the agreement whereby title was vested in the New York Company, divest the latter of such title merely because the Leipzig Company might have taken affirmative steps to nullify the agreement on the theory suggested, assuming the facts to have been as claimed by the defendants.

XV.

The decision of the Court below proceeded on the assumption, that Hans E. Stoehr had a general authority from the Leipzig Company, that would cover the execution by him of a contract for the sale of the shares owned by that company in the Botany Worsted Mills and for the consideration set forth in the contract of February 20, 1917 (Rec., p. 312).

The opinion of Judge Hand shows that, upon the trial, the plaintiff insisted that Hans E. Stoehr was authorized to execute the contract in the name of the Leipzig Company, and prayed that the trial be postponed until it were possible to obtain express evidence of that fact in Germany. The Court reserved decision upon that question until it could learn whether the issue was material to a disposition of the case, meanwhile requiring of the plaintiff to submit by affidavit the particulars of such proof as he could make if permitted (*Rec. p. 310*). That condition was complied with (*Rec. p. 312*). Thereupon the Court ruled as indicated. The existence of the authority cannot, under the circumstances, be questioned.

In *Hanger v. Abbott*, 6 Wall. 532, Mr. Justice Clifford said:

“The suspension of the reemedy during the war is so absolute that courts of justice will not even grant a motion to take testimony in the enemy’s country. *Barrick v. Buba*, 32 Eng. Law & Eq. 465; *Wood v. Allen*, 2 Dall. 102.”

That we were at the time of the trial and are still at war with Germany has been adjudged by this Court.

Hamilton v. Kentucky Distilleries Co.,
251 U. S. 158-161.

Jacob Ruppert v. Caffey, 251 U. S. 291.

The only method by which the testimony of witnesses residing in Germany could be taken would be by letters rogatory, and such letters could not issue so long as there are no diplomatic relations between the United States and Germany, of which fact the Court took judicial notice.

XVI.

The authority of Hans E. Stoehr to execute on behalf of the Leipzig Company the instrument of February 20, 1917, is shown by the record.

He was a member of the Supervisory Board of the Leipzig Company. He had the confidence of his associates on the board. He held a substantial interest in the corporation. He had been in Germany in the spring of 1914. George Stoehr was in the United States in 1914 and 1915. He was one of the two Managing Directors of the corporation.

The death of Hans E. Stoehr before the commencement of this action has deprived the complainant of the benefit of the testimony that he might have given as to his authority. We have, however, the statement made by Heyn & Covington, and approved by Hans E. Stoehr as Treas-

urer of the Botany Worsted Mills and as President of Stoehr & Sons, Inc., in which it is said:

"H. E. Stoehr represented his father and also Stoehr & Company, the Leipzig Company in this county. Stoehr & Company, the Leipzig corporation, is a German stock company with its plant near Leipzig, Germany. Edward Stoehr occupied a position similar to that of a chairman of the Board of Directors and George Stoehr the position of chief executive officer, similar to president" (*Rec. pp. 221, 223*).

Hans E. Stoehr also held in trust 10,000 shares of the 14,900 shares and Max W. Stoehr the remaining 4,900 shares of that block of the stock of the Botany Worsted Mills of which the Leipzig Company was the equitable owner. Being thus vested with the legal title, it is to be presumed that when they undertook to transfer these shares to the New York Company it was done with the authority of the equitable owner of the shares, and that when Hans E. Stoehr undertook in the name of the Leipzig Company to make such transfer, he had the legal power to do so.

In the absence of statutory provisions requiring it, it is not necessary that the authority of the agent or officer of a corporation shall be in writing.

Central Trust Co. v. Bridges, 57 Fed. Rep. 753.

Phelps v. Sullivan, 140 Mass. 36.

Farmers Bank v. Butchers Bank, 16 N. Y. 125.

Wood v. Wise, 153 App. Div. 223; *affd.* 208 N. Y. 586.

A parol appointment has been held sufficient to authorize an agent to assign a patent, a mortgage, a bill of sale of a mining claim, and to subscribe for shares of stock.

McChesney v. Brown, 29 Fed. Rep. 145.

Van Nostrand v. Reed, 1 Wend. 424.

Moreland v. Houghton, 94 Mich. 548.

Dingley v. McDonald, 124 Cal. 90.

Patterson v. Keystone Mining Co., 30 Cal. 360.

Ingersoll Gravel Road Co. v. McCarthy, 16 U. C. Q. B. 162.

Nor is the vote of the board of directors of a corporation necessary to the appointment of an officer or agent or to authorize him to act for the corporation.

United States Bank vs. Danbridge, 12 Wheat. 64.

Bank of Metropolis v. Guttschlick, 14 Pet. 19.

In *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, Mr. Justice Harlan said:

“And it is settled law that the existence of such authority in subordinate officers may, in the absence of express statutory prohibition, be shown otherwise than by the official record of the proceedings of the board. It may be established by proof of the course of business between the parties themselves; by the usage and practice which the company may have permitted to grow up in its business; and by the knowledge which the board, charged with the duty of controlling and conducting the transactions and property of the corporation, had, or must be presumed to

have had, of the acts and doings of its subordinates in and about the affairs of the corporation."

After stating that there was a presumption of authority, the opinion continues:

"That presumption, if not, under the special circumstances of this case, conclusive, might have been overthrown by affirmative proof of want of authority, express or implied, in the president and secretary of the mining company to make overdraft checks, and by proof that the company did not receive the money paid thereon by the bank. There is, however, no such proof in this case. * * * And the finding that 'no resolution or special authority of the defendant was shown authorizing its president and secretary, or either of them, to overdraw its account in bank,' fairly interpreted, means nothing more than that no proof was made, either way, on that point. It does not necessarily imply that resolution to that effect was not, in fact, passed, nor that such special authority was not, in effect, given. The meagre evidence upon which, according to the special finding, the case was tried below, is we think, insufficient to overturn the presumptions which should be indulged in favor as well of the bank as of the integrity and fidelity of the officers of the mining company."

In the important case of *Louisville, New Albany & Chicago Railway Co. v. Louisville Trust Co.*, 174 U. S. 552, Mr. Justice Gray said:

"A corporation, though legally considered a person, must perform its corporate duties through natural persons, and is impersonated in and represented by its principal officers, the president and directors, who are not merely its agents, but are, generally speaking,

the representatives of the corporation in its dealings with others. Shaw, C. J., in *Burrill v. Nahant Bank*, 2 Met. 163, 166, 167; Comstock, J., in *Hoyt v. Thompson*, 19 N. Y. 207, 216. * * * One who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation. In *Merchants' Bank v. State Bank*, 10 Wall. 604, this court stated, as an axiomatic principle in the law of corporations, this proposition: 'Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.' "

This decision was based on the leading case of *Royal British Bank v. Turquand*, 6 El. & Bl. 327. That was an action upon a bond signed by two directors and given for money borrowed by a joint stock company formed under an act of Parliament limiting its powers to the acts authorized by its deed of settlement. This deed provided that the directors might so borrow such sums as should, by resolution passed at a general meeting of the

company, be authorized to be borrowed. The defense was that no such resolution had been passed and that the bond had been given without the authority of the shareholders.

The Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, held the company liable on the bond, Chief Justice Jervis saying:

"We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, in reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."

The principle laid down in that case has not only been generally accepted in England, as is shown in the opinion of Mr. Justice Gray, but also in our courts.

Knox County v. Aspinall, 21 How. 539, 545.

Humboldt County v. Long, 92 U. S. 642.

Zabriskie v. C. C. & C. R. R. Co., 23 How. 381.

Hackensack Water Co. v. DeKay, 36 N. J. Eq. 546, 559, 567.

In the case last cited Mr. Justice Depue said:

"Persons dealing with such companies are, as was said by Lord Hatherly, affected with notice of all that is contained in the statute

and the articles of association; but with regard to all that the directors do with reference to what he calls 'the indoor management of their concern,' that is a thing known to them and to them only, and persons dealing externally with those managing the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, are not to be affected by any irregularities which take place in the internal management of the company. They are entitled to presume that that of which only they can have knowledge, namely, the external acts, is rightly done, when those external acts purport to be performed in the mode in which they ought to be performed. *Mahony v. East Holyford Mining Co., L. R. (H. L.) 593, 594.*"

The general principle, that persons acting for corporations are presumed to have authority to do so, is applicable here.

Rockford, &c. R. R. Co. v. Wilcox, 66 Ill. 417;

Singer Mfg. Co. v. Holdfoot, 81 Ill. 455.

In this case it may well be inquired as to whether the defendant occupies such a status as would enable him to question the applicability of this presumption to the act of Hans E. Stoeckl in executing the contract in question.

In *In re New York Economical Printing Co., 110 Fed. Rep. 516*, a question arose between a trustee in bankruptcy and the holder of a chattel mortgage executed by the bankrupt, as to whether the mortgage had been executed by proper authority. Judge Wallace said:

"We have not overlooked the point made by the trustee that the mortgage was invalid because the consents of the stockholders of the

mortgagor had not been filed in the office of the proper official as required by the provisions of the stock corporation law. These provisions are for the protection of stockholders, and only stockholders can take advantage of any defects in complying with them. *Bank v. Averell*, 96 N. Y. 467, 475; *Paulding v. Steel Co.*, 94 N. Y. 334."

To the same effect is the case of *Bishop v. Kent & Stanley Co.*, 20 R. I. 680; 41 Atl. Rep. 255.

See also

Hervey v. Railway Co., 28 Fed. Rep. 169;
Re Romford Canal Co., 24 Ch. Div. 92;
Wood v. Waterworks Co., 44 Fed. Rep. 150;

Pittsburgh Ry. Co. v. Keokuk &c. Bridge Co., 131 U. S. 371;

Indianapolis Rolling Mill Co. v. St. Louis &c. Ry. Co., 120 U. S. 256;

Jones on Real Property, §153;

Beach on Private Corporations, §744.

XVII.

It is respectfully submitted that the judgment of the District Court should be reversed and the prayer of the Bill of Complaint granted.

LOUIS MARSHALL,
 LOUIS J. VORHAUS,
 Appellant's Counsel.

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Office of the
U.S. District Court
for the Southern District of New York

NOV 8 1931
AMERICAN

NO. 100

IN RE THE ESTATE OF JAMES H. HARRIS, DECEASED

Testamentary Trust

WILLIAM H. HARRIS, APPLICANT

LESTER A. HARRIS, ET AL., APPLICANTS

APPEAL FROM THE DECISION OF THE COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM H. HARRIS

WILLIAM H. HARRIS, APPLICANT

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

MAX W. STOEHR, APPELLANT,	} No. 546.
v.	
JAMES M. WALLACE ET AL., APPELLEES.	

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

Comes now the Solicitor General, on behalf of the Alien Property Custodian, one of the appellees herein, and moves the court to advance this case and set it for hearing on some date during the month of December, 1920.

The case is a suit in equity against the Alien Property Custodian and others to enjoin the sale of 14,900 shares of the capital stock of the Botany Worsted Mills, seized by the Alien Property Custodian as property of an alien enemy under the provisions of the trading with the enemy act of Congress, as amended. (40 Stat., c. 106, p. 411.) The relief prayed for is predicated, among other things, upon a contention that the act of Congress authorizing the seizure and sale of property of alien

enemies is unconstitutional, for various and sundry reasons, and also in contravention of certain treaties between the United States and other Governments. The same questions are applicable to all of the cases in which the Alien Property Custodian has exercised the powers conferred upon him by the act of Congress. Any further delay in a final determination of this question will, therefore, greatly embarrass the Alien Property Custodian in the final settlement of all the matters which have come under his jurisdiction. In addition, a very large number of cases are now pending in the lower courts, the determination of which depends upon the same question. It is of vital importance to the orderly administration of enemy property that a decision be obtained at the earliest possible moment.

The district judge sustained fully the contentions of the Government and dismissed the bill, rendering an exhaustive opinion, from which it appears that he had no difficulty in reaching this conclusion. Upon the urgent application, however, of counsel for appellant, he made an order on July 1, 1920, permitting the appeal to operate as a supersedeas upon certain conditions, among which was the condition set out in the decree as follows:

That the counsel for the complainant and appellant join with the counsel for the defendants in a motion for a preference or advancement of this cause in the Supreme Court of the United States, so that said ap-

peal may be argued therein in the October, 1920, term of the Supreme Court, or as soon as the said cause can be heard or that the counsel for the complainant and appellant consent to such preference or advancement.

Counsel for the appellees, other than the Alien Property Custodian, concur in this motion.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

NOVEMBER, 1920.

○

No. 546

JAN 3 1921

JAMES D. MANDERSON

Supreme Court of the United States

OCTOBER TERM, 1920

MAX W. STOEHR

Appellant

against

JAMES N. WALLACE and others

Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND ARGUMENT FOR APPELLEES:

BOTANY WORSTED MILLS AND
DIRECTORS OF BOTANY WORSTED MILLS
STOEHR & SONS, INC. AND
DIRECTORS OF STOEHR & SONS, INC.

JOHN QUINN ✓
PAUL KIEFFER

Counsel for

*Botany Worsted Mills and its Directors
Stoechr & Sons, Inc. and its Directors*

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Supreme Court of the United States

OCTOBER TERM, 1920

No. 546

MAX W. STOEHR,

APPELLANT

AGAINST

JAMES N. WALLACE AND OTHERS,

APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND ARGUMENT FOR THE APPELLEES:

BOTANY WORSTED MILLS AND
DIRECTORS OF BOTANY WORSTED MILLS
STOEHR & SONS, INC.
DIRECTORS OF STOEHR & SONS, INC.

This is an appeal by the complainant from the final decree of the District Court of the United States for the Southern District of New York entered May 13, 1920 (Transcript page 327; folios 561-563), dismissing upon the merits the original and supplemental bills of complaint (page 319; folios 547-547½).

The summary of the facts in the appellant's brief omits many vital and essential facts—many of the facts which were held by Judge Hand in his opinion to be decisive of the case. The omission of those facts is startling. It omits scores of facts that, when analyzed in their true relation to the other record facts, are fatal to the appellant's case.

The summary of facts contains no reference whatever to the crucial Heyn & Covington letter of February 9, 1918, a letter which, without almost any other evidence, is decisive of the case against the complainant. It also omits all reference to the official approval of that letter by Hans E. Stoeck. It makes no reference to the detailed letter, with its enclosures, of Hans E. Stoeck written from Passaic, New Jersey, February 5, 1918, to Heyn who was then in Washington (page 161; folio 311; defendants' Exhibit X, page 244; folios 447-448). It makes no reference to the second letter of Hans E. Stoeck written from 200 Fifth Avenue, New York City, February 5, 1918, to Heyn in Washington (defendants' Exhibit H, page 224; folio 425). Those three letters were among the most, if they were not the most, decisive exhibits in the case. They were so regarded by Judge Hand, as his analysis of them in his opinion shows. No reference whatever was made to them in the summary of the facts preceding the law points of the appellant's brief.

Those and many other astounding omissions make it necessary that the real facts—all of the relevant facts—be stated in this brief in their true order and right perspective.

Appellant's counsel repeatedly seeks to draw misleading deductions from even the few relevant facts that his brief contains. Almost the very first sentence in his statement of facts (brief, page 2) is a misstatement, namely: "*The material facts are practically admitted*".

It is not going too far to say that the deliberate omission from the summary of facts of the decisive and vital Heyn & Covington letter and of the two decisive and vital letters of Hans E. Stoeck to Heyn in Washington, makes that statement a travesty of the facts.

The industry of counsel for the appellant is well known. If the facts—all the facts—were in favor of the appellant's contention, we may be quite sure that they would *all* have been stated in his brief. But when the facts are so overwhelmingly against the complainant as they are here, it is little wonder that his counsel dwells at great length, dwells exhaustively, on what he contends to be the law, and thus labors to get away—far away, as far away as possible—from the facts.

The statement of the facts by counsel for the appellant is designed to give the impression that the case involves merely the construction of a written contract. But the most important evidence revealed the facts and circumstances leading up to the contract and to its execution and of course not appearing upon the face of the contract. Those facts all bear upon the vital question in the case, namely, the true intent of the parties and whether in fact THE PERSONS SIGNING THE PAPER INTENDED TO MAKE ANY CONTRACT AT ALL. That those facts were important and controlling is shown by Judge Hand's opinion, which, aside from the constitutional points considered by him, was based upon those facts and not upon the construction or interpretation of the pretended contract.

The following statement gives *all* the relevant facts, and yet most of them are not even alluded to by counsel for the complainant in his statement of facts.

Following our statement of the facts, we will point out a few of the misstatements of fact made by counsel for the appellant. Then will follow a brief summary of Judge Hand's opinion, the basis of which was misstated in the brief of counsel for the appellant. Then will come the discussion of the points of law.

THE CORPORATIONS AND THE PERSONS INVOLVED

Kammgarnspinnerei Stoeck & Co., Actiengesellschaft

This is a corporation of Leipzig, Germany, with a share capital of 12,000,000 marks (page 119; folio 232).

Its stock is dealt in on the stock exchanges of Leipzig and Berlin. Among its stockholders were the complainant, Max W. Stoehr, who claimed that he had owned 600,000 marks of its stock (page 119; folio 232); his brother Georg Stoehr, who, Max W. Stoehr asserted, had owned between 1,500,000 and 2,000,000 marks of its stock, and Hans E. Stoehr who was said to have owned about one million marks of its share capital (pages 124-125; folios 240-241). Max W. Stoehr testified that he did not know the stock holdings of his father, Eduard Stoehr, in the corporation (pages 124-125; folios 240-241).

The officers of the Leipzig corporation were: Two "directors", either one of whom might sign and act alone, and so-called *procuristen*, two of whom were bound to sign together or one *procuristen* with one of the two directors (Max W. Stoehr, page 124; folio 241; Ferdinand Kuhn, page 166; folio 319). The committee of the company was known as the *aufsichstrat*, which corresponds to an American executive committee (Max W. Stoehr, pages 124-125; folios 241-242; Ferdinand Kuhn, page 166; folio 319). The *aufsichstrat* had a chairman and "the exact definition of *aufsichstrat* is that it is 'the supervising board'" (page 110; folio 212). In February, 1917, the board of directors of Stoehr & Co. consisted of five members: Eduard Stoehr, Hans E. Stoehr, Dr. Rosenthal, Paul Gulden and Carl Beckmann (defendants' exhibit F, pages 218-223; folios 417-423).

Botany Worsted Mills

This is a corporation of New Jersey (page 105; folio 201), now with a capital stock of \$3,600,000, divided into 36,000 shares of the par value of \$100 each (page 105; folio 201).

It manufactures and sells woolen and worsted goods and yarns (page 105; folio 201).

Stoehr & Sons, the partnership

This was a partnership consisting of Eduard Stoehr a German subject, of Leipzig, Germany, and his sons Georg Stoehr, also a German subject, of Leipzig, Germany, Hans E. Stoehr, a German subject, resident at that time in the United States, and the complainant Max W. Stoehr, a former German subject and now a naturalized citizen. The respective partnership interests (defendants' exhibit A, pages 210-214; folios 402-409) were as follows:

Eduard Stoehr	\$420,000	(42/56ths)
Hans E. Stoehr	\$ 80,000	(8/56ths)
Georg Stoehr	\$ 50,000	(5/56ths)
Max W. Stoehr	\$ 10,000	(1/56th)
<hr/>		
Total	\$560,000	

Stoehr & Sons, Inc.

This is a New York corporation, incorporated February 17, 1917. The incorporators were Max W. Stoehr and Georg Roehlig and Alfred de Liagre (relatives of the Stoehrs). Its authorized capital stock of the par value of \$250,000, divided into 2,500 shares of \$100 each, was issued for all of the assets of the partnership.

The chief personal participants were:

Hans E. Stoehr, a son of Eduard Stoehr of Leipzig, Germany, and who was a German subject then resident in the United States; and the complainant Max W. Stoehr, also a son of Eduard Stoehr, a German by birth and naturalized in 1911 (page 100; folio 193).

The other persons were:

Eduard Stoehr, the father of the other three Stoehrs, a German subject and a resident of Leipzig, Germany, and a member of the aufsiehrat of Kammgarnspinnerei

Stoehr & Company. He had been a nominal director of the Botany (defendants' exhibit V, pages 242-244; folios 445-446).

Georg Stoehr, also a German subject and a resident of Leipzig, Germany, and a nominal director of the Botany Worsted Mills, though residing abroad (defendants' exhibit V, pages 242-244; folios 445-446). He was said by Max W. Stoehr to be also a stockholder of Kammgarnspinnerei Stoehr & Company. He was one "of the two directors" of the Leipzig company in 1917, the other being a Dr. Kuntz (page 119; folio 232). He was not a member of the aufsichstrat (page 119; folio 232). Georg Stoehr arrived in the United States "before Christmas" in 1914, and left about the middle of October 1915 (testimony of Max W. Stoehr, page 120; folio 233).

Georg Roehlig, a cousin of the two Stoehrs, participated in the organization of the New York company. He assisted the two Stoehrs "in perfecting the organization" (Max W. Stoehr, page 120; folio 234).

De Liagre, who took part in the organization and was one of the voting trustees, was also related to the Stoehr family.

Herbert A. Heyn was a member of the law firm of Heyn and Covington. He and his firm were counsel for the Botany company, and also counsel for the two Stoehrs in New York (page 112; folio 216). Heyn had drawn the copartnership agreement of 1913 (page 121; folio 236). He organized the New York company and prepared the contract between it and the Leipzig company, which Hans E. Stoehr in New York pretended to sign for the Leipzig company. Heyn's death occurred April 30, 1918 (page 129; folio 250).

To avoid repetition, we shall refer to the *alleged* contract of February 20, 1917, merely as "the contract".

We shall refer to the Kammgarn Spinnerei Stoehr & Company Actiengesellschaft of Leipzig, either as "the Leipzig corporation" or "the Leipzig company" or as "Stoehr & company" or "Stoehr & co.", the name by which

the Leipzig corporation was usually referred to by the Stoehrs in English.

Stoehr & Sons, Inc. will be referred to for the most part as "the New York company".

The partnership of Stoehr & Sons we sometimes refer to as "Stoehr & Sons" and sometimes as "the partnership".

The 14,900 shares owned by the Leipzig corporation which were the *nominal* subject of the contract will be generally referred to as "the shares".

The Botany Worsted Mills of Passaic, New Jersey, will be referred to for short as "the Botany" or "the Botany company".

Before a consideration of the facts, it may be well to recall here the following pertinent historic dates:

January 9, 1917—Announcement by the German government of unrestricted submarine warfare.

February 1, 1917—Unrestricted submarine warfare begun.

February 3, 1917—Diplomatic relations between the United States and Germany broken off.

April 6, 1917—America declared war on Germany.

The following dates of the following acts are pertinent:

October 6, 1917—*The Trading with the Enemy Act* became law.

October 22, 1917—A. Mitchell Palmer appointed Alien Property Custodian and continued as Alien Property Custodian until March 7, 1919.

March 28, 1918—Amendment to *The Trading with the Enemy Act* giving the Alien Property Custodian unconditional and unrestricted power to sell captured property.

November 4, 1918—Amendment to *The Trading with the Enemy Act*, providing for the issuance of new certificates in place of former certificates, not in this country, and in other material respects.

March 7, 1919—Francis P. Garvan became Alien Property Custodian and is still Alien Property Custodian (page 155; folio 300).

CERTAIN RELEVANT DATES IN THE CASE

February 20, 1917—The *alleged* contract.

February 20, 1917—The placing of the 2980 rubber stamps entries upon the stock record of the Botany.

December 3, 1917—Sworn report by Max W. Stoehr to the Alien Property Custodian as to the voting trust certificates held by him as trustee for Eduard Stoehr (defendants' exhibit Q-1, pages 276-285; folios 490-497).

December 3, 1917—Sworn report by Max W. Stoehr to the Alien Property Custodian as to the voting trust certificate held by him as trustee for Georg Stoehr (defendants' exhibit R-1, pages 285-286; folio 498).

December 6, 1917—Report by Stoehr & Sons, Inc. to Alien Property Custodian, sworn to by Max W. Stoehr as treasurer.

December 11, 1917—Sworn report by Thomas Prehn, president of the Botany, to the Alien Property Custodian.

February 3 to 6, 1918—Heyn's and Lenssen's conferences in Washington.

February 5, 1918—Hans E. Stoehr's two letters from New York to Heyn in Washington.

February 9, 1918—Letter of Heyn & Covington, approved by Hans E. Stoehr as treasurer of the Botany and as president of Stoehr & Sons, Inc., to Alien Property Custodian in Washington.

March 18, 1918—Death of Hans E. Stoehr (page 100; folio 193).

April 5, 1918—Seizure of the 14,900 shares of stock by the Alien Property Custodian.

April 22, 1918—Transfer of the 14,900 shares into the name of the depositary for the Alien Property Custodian.

April 30, 1918—Death of Herbert A. Heyn (page 112; folio 216).

October 10, 1918—Max W. Stoehr's resignation as secretary and director of the Botany.

October 16, 1918—Max W. Stoehr's resignation as secretary and director of Stoehr & Sons Inc.

December 2, 1918—Advertised date of sale of the shares.

The Facts

In the certificate of incorporation of the New York company (paragraph ninth) the subscribers each agreed to take the following shares in the corporation:

Max W. Stoehr	8 shares
Georg G. Roehlig	1 share
Alfred deLiagre	1 share
<hr style="width: 10%; margin: 5px auto;"/>	
Total	10 shares

The certificate was sworn to February 15, 1917. On the same day Heyn & Covington mailed the certificate to the secretary of state at Albany. The certificate was received by the secretary of state February 16, 1917; and he acknowledged its receipt and issued the usual certificate that it had been placed upon file and recorded on February 16, 1917, and that the filing fees had been paid. The duplicate original of the certificate of incorporation was filed in the office of the county clerk of New York county on February 17, 1917.

The first meeting of the incorporators was held at 200 Fifth Avenue on February 19, 1917, at 4:30 P. M. (plaintiff's exhibit 2, pages 186-188; folios 352-356). All of the incorporators were present (plaintiff's exhibit 2, pages 186-188; folios 352-356).

A form of by-laws was presented, read article by article, "and unanimously adopted".

Having read the by-laws "article by article" and the same having been unanimously adopted, the 4:30 P. M. meeting of the incorporators (there were as yet no stockholders) then proceeded to business, and the "offer" in the name of the partnership to the New York company bearing date February 19, 1917, was recited, providing that the corporation should issue to the partnership \$250,000 of its stock, "full-paid and non-assessable," and assume the debts of the partnership, in consideration of the transfer to the company of "the business mentioned in their written offer

presented to the meeting" (offer and bill of sale; plaintiff's exhibit 3, pages 188-189; folios 357-359). The minutes then recite that the directors were authorized "to purchase said business and to issue said stock in payment thereof" by the incorporators, not yet stockholders (minutes of first meeting of incorporators; plaintiff's exhibit 2, pages 186-188; folios 352-356). The minutes further recited that it was then resolved that the \$250,000 of stock so to be issued should include "the stock subscribed by the incorporators of this company as evidenced by the certificate of incorporation", the incorporators thus attempting legally to lift themselves by their boot-straps.

Though the certificate of incorporation placed an obligation upon Max W. Stoehr to pay for eight shares, upon Roehlig to pay for one share, and upon deLiagre to pay for one share, the incorporators, who were not stockholders, apparently attempted to discharge that obligation by a recital that the company should accept in discharge thereof "the business agreed to be sold to the company as set forth in the preceding resolution" (plaintiff's exhibit 2, pages 186-188; folios 352-356).

The minutes next recite that it was resolved that the entire stock of the company, \$250,000 "should be full paid and non-assessable". A seal was thereupon adopted, and the following were elected directors: Hans E. Stoehr, Max W. Stoehr, Georg G. Roehlig and Alfred deLiagre.

Next followed, in the rapid course of events on that short but busy winter afternoon of Monday February 19, 1917, the first meeting of the board of directors. The waiver of the directors dated February 19, 1917, waived notice of and consented to the holding of a meeting at 200 Fifth Avenue, the office of the partnership, at 4:45 o'clock P. M. fifteen minutes after the incorporators' meeting was supposed to have been held.

Hans E. Stoehr took part in the incorporators' meeting.

The offer from the partnership to the New York company was dated February 19, 1917, and was signed "Stoehr & Sons", in the handwriting of Hans E. Stoehr. At the foot thereof, on the same page, under the same date, February 19, 1917, the offer was thus accepted:

"The foregoing offer is hereby accepted upon the above terms and the said liabilities are hereby assumed.

STOEHR & SONS, INC.,
by Georg G. Roehlig,
Vice-Pres.

MAX W. STOEHR,
Sec'y."

The bill of sale annexed to the offer of February 19, 1917 (plaintiff's exhibit 3, pages 188-189; folios 357-359), was dated 19th February, 1917. It was signed "Stoehr & Sons" in the handwriting of Hans E. Stoehr, and the signature witnessed in the presence of Max W. Stoehr (plaintiff's exhibit 3, pages 188-189; folios 357-359).

The following certificates, representing the following numbers of shares of stock were made out in the following names with the following dates:

<i>Number of Certificate</i>	<i>Number of Shares</i>	<i>Name of Stockholder</i>	<i>Date of Certificate</i>
1	1875	Max W. Stoehr	February 19, 1917
2	357.14	Hans E. Stoehr	February 19, 1917
3	223.21	Max W. Stoehr	February 19, 1917
4	44.65	Max W. Stoehr	February 19, 1917
Total	2500		

(testimony, page 102; folio 198).

Max W. Stoehr was not named *as trustee* in either certificate No. 1 for 1875 shares or in certificate No. 3 for 223.21 shares.

Simultaneously with the issuance of the certificates of stock, Max W. Stoehr, February 19, 1917, signed a declaration of trust of certificate No. 1 for 1,875 shares in favor of Eduard Stoehr (page 249; folio 453). He executed a like declaration of trust in respect of certificate No. 3 for 223.21 shares in favor of his brother

Georg Stoehr (page 248; folio 451). He also executed a stock power in respect of certificate No. 1 for 1,875 shares appointing Eduard Stoehr his "true and lawful attorney", etc. (page 249; folio 452). Neither of those declarations of trust nor said stock power was ever delivered to either of the Stoehrs in Germany but they were merely left with the papers of the New York company.

Under the same date each of the four certificates was transferred to Hans E. Stoehr, Max W. Stoehr and Georg Roehlig as voting trustees.

As of the same day, February 19, 1917, each of said certificates was endorsed, No. 1 by Max W. Stoehr, No. 2 by Hans E. Stoehr, No. 3 by Max W. Stoehr, No. 4 by Max W. Stoehr, each endorsement purporting to be witnessed by A. deLiagre, and all ran to "Hans E. Stoehr, Max W. Stoehr and Georg Roehlig as voting trustees".

Certificate No. 5 was for 2500 shares and was made out in the name of "Hans E. Stoehr, Max W. Stoehr and Georg Roehlig as voting trustees" and was also dated February 19, 1917 (testimony, page 103; folio 198).

The next step, purporting upon the face of the papers, to have been taken, in that crowded afternoon, related to the voting trust agreement. The voting trust agreement (plaintiff's exhibit 5, pages 197-199; folios 365-370) purports to be dated 19th February, 1917, and to have been executed by Hans E. Stoehr and Max W. Stoehr "as stockholders" and by Hans E. Stoehr, Max W. Stoehr, and Georg Roehlig as voting trustees, the signatures of *all* being witnessed by Herbert A. Heyn. It provided for the deposit of the stock with the voting trustees for *five years*, till February 19, 1922 (paragraph 2 of voting trust agreement, plaintiff's exhibit 5, page 197; folio 366).

Paragraph 6 of the voting trust agreement related to vacancies and provided that in case of the death, resignation or disability of either of the voting trustees, "such trustee shall be succeeded by Alfred deLiagre".

Next followed, also on that same afternoon, the issuance of the following four voting trust certificates, all of the same date, February 19, 1917:

<i>Number of Voting Trust Certificate</i>	<i>Issued in the Name of</i>	<i>Number of Shares</i>
One	Max W. Stoehr, trustee	1875
Two	H. E. Stoehr	357.14
Three	Max W. Stoehr, trustee	223.21
Four	Max W. Stoehr	44.65
Total		2500

When one considers the time that would *normally* be taken to do those things, one is led to the conclusion that the purported acts and transactions were done with unusual haste.

Then the scene changed from 200 Fifth Avenue to Passaic, New Jersey, for the next meeting of the board of directors purported to have been held "at the office of the Botany Worsted Mills, at Passaic, New Jersey", the next day, Tuesday February 20, 1917, at 10.30 o'clock. There were present at that meeting, as recited in the minutes, Hans E. Stoehr, Max W. Stoehr, Alfred DeLiagre and Georg G. Roehlig. The following is THE COMPLETE RECORD, as shown by the minutes in reference to the contract:

"The matter of the purchase of fourteen thousand nine hundred (14,900) shares of the capital stock of the Botany Worsted Mills WAS PRESENTED TO THE MEETING AND WAS DISCUSSED.

A form of proposed contract between this company and the corporation of Kammgarnspinnerei Stoehr & Company relating to the said purchase WAS LAID BEFORE THE MEETING.

On motion duly made, seconded and carried, the said contract was approved and the vice-president and secretary of the company were directed to execute the same in Passaic, New Jersey, for and on behalf of this company" (plaintiff's exhibit 7, page 201; folios 376-379).

There was no evidence in the entire record that at the meeting of the directors of the New York company of

February 20, 1917, at which the contract was supposed to be authorized, any consideration was given by the directors to either the financial condition of the corporation or its ability to meet the obligations purporting to be assumed by the contract.

The provisions of the contract will be considered in connection with our discussion of the law, but it may be noted in passing that, on the basis of the book value for the years 1917 and 1918 (defendants' exhibit U, pages 240-241; folio 444) the 14,900 shares were worth, one year from the date of the contract, February 20, 1918, when the first payment under the contract was to be made, \$4,737,937.46, and two years from the date of the contract when the second payment was to be made, that is, February 20, 1919, \$5,199,559.58; and that inclusive of the dividends, as contemplated by the contract, the New York company would have had to pay on February 20, 1918, to the Leipzig corporation \$1,200,887.49 as the first one-fifth of the purchase price, and on February 20, 1919, as the second-fifth of the purchase price the sum of \$1,337,911.91 (defendants' exhibit U, pages 240-241; folio 444).

The book value of the 14,900 shares on February 20, 1920, as of November 30, 1919, as shown by plaintiff's exhibit 12 (page 208; folio 400), was \$6,514,088.61. One-fifth of that book value, the third instalment payable February 20, 1920, would be \$1,302,817.72. Adding to that three-fifths of the 25% dividend amounting to \$372,000 paid on said shares from February 20, 1919, to February 20, 1920, would make \$223,500.00. Total *third instalment payable February 20, 1920*, upon the face of the contract, \$1,526,317.72.

The total of the first two annual payments, according to defendants' exhibit U (pages 240-241; folio 444) and of the third instalment, according to plaintiff's exhibit 12, would have amounted by February 20, 1920, to the sum of \$4,065,117.12.

The inability of the New York company so far as its assets were concerned on February 20, 1917, to discharge

the obligations of such a contract, will be considered in point I.

The share capital of the Leipzig corporation was 12,000,000 marks (testimony, page 119; folio 232). It is a fact, of which the Court may take judicial notice, that the mark in the months of February and March, 1917, averaged approximately sixty-eight cents for four marks. Upon that basis the 12,000,000 marks capital of the Leipzig company on February 20, 1917, amounted in dollars to \$2,047,500. Hence the contract of February 20, 1917, would have stripped the Leipzig corporation of the ownership of an asset some three times the then value in dollars of its own total share capital, measured at that time in dollars, and vested the ownership of that great asset in a New York corporation IN WHICH THE LEIPZIG CORPORATION DID NOT OWN ONE SHARE OF STOCK.

Whatever claim there might be that, though the attempt to transfer the assets of the *partnership* to the New York company was unauthorized, yet the resultant stock was issued in the same proportions in which the *partnership* interests had been held, and hence that no injury was done to the German *partners*, no such argument can be made to justify the transaction by which the Leipzig corporation purported to be stripped of a more than \$6,000,000 asset and that asset vested in a New York company in which the stockholders of the Leipzig company generally *had no interest*.

No attempt was made upon the trial to show any identity of shareholding interests in the Leipzig and New York corporations. The stock of the New York company—all of it—was owned by the four *Stoehrs* in the proportions named. The stock of the Leipzig corporation was dealt in on the stock exchanges of Leipzig and Berlin, and the *Stoehrs* were not even shown to control a majority of the 12,000,000 marks share capital (testimony of Max W. *Stoehr*, page 119; folios 232-233; pages 124-125; folios 240-242).

There was no recital in the minutes of the meeting of the directors of the New York company of February 20, 1917, and nothing of record in the entire case, that there was any-

one present at the meeting authorized to speak for the Leipzig corporation or to dispose of an asset of that company worth over \$6,000,000.

The attempt of Max W. Stoeck upon the trial to show that Hans E. Stoeck had *implied* authority to represent the Leipzig corporation in that transaction, will be considered in point II, which shows the lack of authorization to make the contract. For that reason the evidence on that point will not be discussed here. It is sufficient to point out that Max W. Stoeck did not attempt to claim that *he* had any authority, either express or implied, or that any one else than his brother Hans E. Stoeck, had any authority, either express or implied, to act for or to represent the Leipzig corporation in the transaction.

On that 20th of February, 1917, after unrestricted submarine warfare had been not only proclaimed by the German government but was mercilessly in execution, it was as certain as anything human could be that a declaration of war between the United States and Germany was only a matter of time.

The minutes of the meeting of the directors of the New York company of February 20, 1917, state that "The matter of the purchase of fourteen thousand nine hundred (14,900) shares of the capital stock of the Botany Worsted Mills *was presented* to the meeting and was discussed." There is no statement as to who "*presented*" it, and unless it was a fourth-dimensional presentation it must have been presented to the meeting by one of those present. Apparently the meeting presented it to itself.

The minutes also recite that "A form of proposed contract between this Company and the corporation of Kammgarnspinnerei Stoeck & Company relating to the said purchase *was laid before the meeting*". There is nothing in the record to show who did the "*laying*", or whether the contract was extracted from the air, or was evolved out of the sub-consciousness of the directors of the New York company who presumably purported to interpret the unexpressed and un-thought thoughts of the Leipzig corporation and its directors and officers, or who presumably undertook to think thoughts and conclude conclusions that

the Leipzig corporation had never thought or concluded, and to make decisions for the Leipzig corporation that the Leipzig corporation had never heard of.

The two Stoehrs, their cousin Roehlig and their relative and associate de Liagre, with their counsel Heyn, made their motions in *apparently* blissful disregard of the rights of the Leipzig corporation and *apparently* not caring whether the Leipzig corporation and its stockholders would be grossly defrauded if *what was done in fact represented the true intention of the parties to those writings.*

The agreement "made at Passaic" (plaintiff's exhibit 8, page 202; folio 380; printed at page 14; folios 25-29), was signed in the name of "Kammgarnspinnerei Stoechr & Co., Aktiengesellschaft" by "Hans E. Stoechr", NOT AS A MEMBER OF THE AUFRICHTSTRAT, NOT AS ATTORNEY-IN-FACT, NOR IN ANY OTHER CAPACITY. The whole thing was done under the advice of counsel (testimony, page 121; folio 236).

The entire record shows what care and exactitude were employed in the normal corporate acts of the Stoehrs as officers of the Botany. The fact that Hans E. Stoechr signed the contract personally, without any statement that he was acting for the Leipzig corporation, and did not sign it as its attorney-in-fact or agent, has a significance which, taken into consideration with the other facts, will not be overlooked by the Court. If the Leipzig company had authorized the contract, that fact would have been recited in the minutes and in the contract.

There was no claim made upon the trial and no attempt made to prove that there was ever any delivery of the contract to the Leipzig corporation or to anyone on its behalf.

The following are the undisputed facts regarding what was done or attempted to be done respecting the shares on or as of February 20, 1917, in or upon the books of the Botany:

(A) There is upon 2980 pages of the book of stock records of the Botany, representing the 14,900 shares, the following:

"Transferred to (PRINTED) Stoehr & Sons Inc. New York (*rubber stamp*) by deposit of certificate with (PRINTED) Geo. Stoehr, Director (*rubber stamp*). Passaic, N. J. (PRINTED) Feb. 20, 1917 (*rubber stamp*)

Hans E. Stoehr (*rubber stamp*)
Treas." (PRINTED)

(Zimmerman, page 137; folio 266).

(B) The certificates representing the 14,900 shares were not in the United States and had not been here for years.

(C) No evidence was given as to *when* those 2980 rubber stamp entries were made in the records of stock of the Botany. It was stipulated merely that "there are 2980 pages to the same general effect", but no evidence was given by plaintiff as to when said rubber stamp entries were made (testimony, page 137; folios 266-267).

(D) At the time those rubber stamp entries were placed upon the 2980 brackets on the 2980 pages of the stock records of the Botany, the Botany had not received any certificate from Leipzig respecting "the deposit of certificates with" director of the Botany in Leipzig, and there was no evidence received by the Botany that there was in fact any deposit of the certificates representing those 14,900 shares with Georg Stoehr, director in Leipzig.

(E) The statement rubber-stamped upon the 2980 brackets in the book of stock records, referring to the transfer of those certificates "by deposit of certificates with" (printed) "Georg Stoehr, Director (*rubber stamp*), Passaic, N. J." (printed) WAS A PALPABLE MISREPRESENTATION OF FACT. There was no "deposit of certificates with Georg Stoehr, director, Passaic, New Jersey", for the reason that neither Georg Stoehr nor the certificates were in the United States at that time. There was no evidence that the certificates had even been deposited with, or were at that time held by, Georg Stoehr, director, in Leipzig.

(F) There was no evidence that a copy of the contract, either uncertified or certified, by any officer of the New York company, was lodged or filed with, or delivered to, the Botany, as authority for the attempted transfer.

As will be shown in Point III, the universal practise of the company and the intent of the by-laws, was that in case of transfer made *in this country* the certificates were required to be presented for stamping as part of the act of transfer. That practise and requirement of the by-laws was not complied with.

(G) Zimmerman, the chief accountant of the company, and a hold-over from the German regime, testified, and his testimony on this point was uncontradicted, that the rubber-stamp notations of the transfer on the books of the Botany were made AT THE PERSONAL DIRECTION OF HANS E. STOEHR (Zimmerman, page 137; folio 267).

No evidence was offered on behalf of the complainant of any transfer or assignment, or even of the execution and delivery of any stock power, purporting to assign the 14,900 shares from or by either Hans E. Stoehr as trustee as to 10,000 shares or Max W. Stoehr as trustee as to 4,900 shares, which prior to that time had stood in their names as trustees.

ON A VITAL POINT OF THE CASE RESPECTING THE TRANSFER OF TITLE TO SAID SHARES EVEN ON THE BOOKS OF THE BOTANY COMPANY ITSELF, THERE WAS A COMPLETE AND UTTER FAILURE OF PROOF ON BEHALF OF THE COMPLAINANT.

While there were certain admissions in the testimony regarding the rubber stamp entries on the stock record of the Botany, they were made with the express reservation that the defendants did not admit that any one "was a legal transfer" (testimony, page 106; folio 204). The Court, speaking with reference to the *physical* transfer on the Botany book of the 10,000 and the 4900 shares from the names of Hans E. Stoehr and Max W. Stoehr, as trustees, said: "This admission is without conceding the validity of the transfer to effect a change of legal title."

If there ever was a case of an attempted transfer "by main strength", such a characterization would fitly apply to the making of the 2980 rubber stamp entries by Zimmerman in the record of stock book of the Botany "*at the personal direction of Hans E. Stoeck*". To say that that was a valid transfer is absurd. It was a rubber-stamp sham, a characteristic part of the entire sham transaction.

(H) It was established by the undisputed testimony of Zimmerman that the question of the putting or the making of those 2980 rubber stamp entries upon the book of stock records of the Botany was never called to the attention of, or passed upon by, the board of directors of the Botany (testimony, pages 146-147; folios 284-285). Hans E. Stoeck was never authorized by the board of directors of the Botany to have his name, stamped with a rubber stamp, placed upon any of the 2980 brackets on the 2980 pages of the book of stock records of the Botany above the printed word "Treas." (testimony, pages 146-147; folios 284-285). There was no proof that the other officers or other directors of the Botany even knew of the 2980 rubber stamps upon the book of stock records of the Botany. There was no attempt to prove that the board of directors of the Botany had waived any of the provisions of the by-laws respecting the transfer of its shares, or that the board of directors had authorized the officers of the company to accept a copy of the contract as a compliance with the by-laws respecting the transfer of the shares.

(1) The account of the Leipzig corporation with the Botany beginning December 1, 1914, and coming down to November 29, 1916, is contained in defendants' exhibit Q (folio 438) and that account contained credits of dividends, as well as credits on account of other transactions in current account, and the payment of dividends direct to the Leipzig corporation or upon its order.

After February 20, 1917 the Botany dividends upon the shares "were credited on the Special Account" of the New York company with the Botany (Zimmerman, page 138; folio 268). NO DIVIDENDS ON THOSE SHARES WERE EVER

PAID TO THE NEW YORK COMPANY (Zimmerman, page 138; folio 268).

Defendants' exhibit T (pages 238-239; folio 443) gives the history, in condensed form, from the books of the company, as to dividends paid upon the 14,900 shares from February 20, 1917 down to January 24, 1920. We quote from defendants' exhibit T (pages 238-239; folio 443) as follows:

Date Declared

<i>Payable</i>	<i>Rate</i>	<i>Amount</i>	
April 15, 1917	14%	\$208,600	Credited to acct. Stoehr & Sons, Inc., <i>Special</i> , under date of Mar. 31, 1917.
Sept. 15, 1917	3%	\$44,700	Credited to Acct. Stoehr & Sons, Inc., <i>Special</i> , under date of Oct. 31, 1917.

Those two sums, as is shown by defendants' exhibit T (pages 238-239; folio 443) were never paid to the New York company or drawn against by the New York company, but on the contrary were held in a *special account* and, pursuant to the demands of the Alien Property Custodian, were, as money belonging to an alien enemy, to wit, the Leipzig corporation, paid to A. Mitchell Palmer, Alien Property Custodian, the \$208,600 on April 25, 1918, and the \$44,700 also on April 25, 1918.

(J) The next transfer of the 14,900 shares was into the name of the depositary for the Alien Property Custodian.

On this point the testimony was:

"The 14,900 shares of stock of the Botany Worsted Mills were on April 22, 1918, transferred into the name of the Peoples Bank & Trust Company as a depositary, and the entry is as follows:—

'Transferred to Peoples Bank & Trust Company as depositary for Alien Property Custodian, Passaic, New Jersey, April 22, 1918. Signed, W. J. Hellmer, Assistant Treasurer' (testimony of Hellmer, page 177; folios 336-337).

That transfer of those shares was made pursuant to the demand of the Alien Property Custodian, duly served upon the Botany company (plaintiff's exhibit 9, pages 202-205; folios 381-382), on April 5, 1918. The demand of the Alien Property Custodian certified that the Alien Property Custodian, acting under the provisions of the Act of Congress known as "*The Trading with the Enemy Act*", approved October 6, 1917, and the executive orders issued in pursuance thereof, by virtue of the authority vested in him by said Act, and by said executive orders, after investigation had determined that Stoehr & Company (Kammgarnspinnerei Stoehr & Company) of Leipzig, Germany, was an enemy (not holding a license granted by the President) and had a certain right, title and interest in and to 14,900 shares of the common stock of the Botany Worsted Mills standing on the books of the Botany Worsted Mills in the name of Stoehr & Sons Inc.

(K) At the meeting of the directors of the New York company held at 200 Fifth Avenue, New York, March 20, 1918, James N. Wallace was elected director in place of Hans E. Stoehr, deceased. Alfred deLiagre resigned as director and Francis P. Garvan was elected in the place of said deLiagre. Georg G. Roehlig resigned as director, and Andrew B. Duvall was elected director in his place. The new board of directors on March 20, 1918 was as follows: James N. Wallace, Francis P. Garvan, Andrew B. Duvall and Max W. Stoehr (defendants' exhibit M-1, pages 272-273; folios 480-482).

On April 30, 1918, at a directors' meeting of the New York company held at 54 Wall Street, New York, James N. Wallace was elected president of the company in place of Hans E. Stoehr, deceased. Max W. Stoehr resigned as treasurer, and Louis Hesse was elected treasurer in his place.

On October 14, 1918, at a directors' meeting held at 54 Wall Street, New York, Max W. Stoehr resigned as director and secretary and Paul Kleffer was elected director in place of Max W. Stoehr. Justus Sheffield was at the same meeting elected secretary in place of Max W. Stoehr.

James N. Wallace was a director of the New York company from March 20, 1918 (defendants' exhibit M-1) and president of the New York company from April 30, 1918, down to the time of his death October 11, 1919.

(L) *Max W. Stoehr's silence in regard to the contract*

From April 30, 1918 to October 14, 1918, when the resignation of Max W. Stoehr as director and secretary of the New York company was accepted, he made no statement to the board of directors of the New York company in regard to the contract of February 20, 1917. He never made any allusion to it nor did he ever during that time make any communication to the board about the contract, by letter or otherwise (pages 171-172; folios 327-328). At no time was there any request or demand by Max W. Stoehr, or by any one on his behalf, upon the New York company, or any of its officers or directors, for any action respecting the 14,900 shares down to the time this suit was begun, December 2, 1918 (page 171; folio 327; page 179; folio 339½).

If the parties to the contract with the New York company had meant what on its face it purported to mean, it would seem that Max W. Stoehr would have made some statement about it to the directors and officers of the New York company. But during all the time he was a member of the board and secretary of the company, he made no such statement and made no claim or request or demand in reference to it.

Not only did he make no claim or even statement or communication to the board of the New York company about the contract, but at the meeting of the board of directors of the company held August 30, 1918, counsel for the company made a report to the directors as to the "alleged contract for 14,900 shares". *Max W. Stoehr at-*

tended that meeting of the board as a director, being at the same time also secretary of the company. The Treasurer presented to the directors a report of the accountants who had been making an examination of the books of the company in order to ascertain its financial condition and pointed out to Mr. Wallace, the president of the company, and to the other members of the board, including Max W. Stoehr, a book entry of \$5,000 on the balance sheet, which was marked "Investment 14,900 shares, Botany Worsted Mills stock." Mr. Wallace asked counsel his opinion regarding that contract. Counsel thereupon explained the objects of *The Trading with the Enemy Act* and explained to the board that the contract was a palpable attempt on the part of Stoehr & Sons to lodge the ownership of the shares of stock in an American corporation under a contract which could not be carried out and which was never meant to be carried out and which was a sham. Counsel further advised Mr. Wallace and the board that he would make a formal report regarding that contract at the next meeting of the board.

Max W. Stoehr was present and said nothing about the contract and made no claim or statement regarding it (page 172; folios 328-329).

At the next meeting of the board, October 16, 1918, counsel made a further report to the board in regard to the contract, the substance of which was a confirmation of the opinion of counsel to the board at the previous meeting of August 30, 1918, when Max W. Stoehr was present, to the effect that the contract was entered into for the purpose of lodging the stock, which was alien owned, and the certificates for which were not even in this country, in an American corporation, for the purpose of evading the provisions of *The Trading with the Enemy Act*. Counsel also called the attention of the board to the fact that the company was not in a position financially to carry out the terms of such an agreement, and advised the board regarding the contract, "explaining the acts that were done, the different things that were purported to be done, and all the circumstances of it, and stating that he had come to the conclusion, and so advised the board, that that did not represent

the real intention of the parties" (pages 173-174; folios 331-332).

In answer to the question of the Court, the treasurer of the company, who was present at that meeting, said: "I remember him (counsel) saying that *the contract did not represent the true intent of the parties*, but that is not suggestive of anything more to me, excepting that he brought out the fact also that the company was not in a financial condition to carry out the terms of the contract" (page 174; folio 332).

(M) It was demonstrated by the defendants upon the trial that it was perfectly easy and quite in the ordinary course of every day banking and business practice at that time and for weeks before and for weeks afterwards to send wireless messages *from* the United States to Germany, and equally easy and customary for persons in Germany to send wireless messages to the United States and to conduct important business transactions by wireless, and pay and receive money by wireless. The undisputed and indisputable facts in regard to the attempt *on the face of the papers* to show a divesting of the Leipzig company's ownership in the shares and a transfer *on the face of the papers* of some title therein to the New York company, as shown by the records of the New York company and the testimony of its officers and the records and files of the partnership in the possession of the officers of the New York company, were as follows:

There was no certificate representing the shares or any part thereof or anything purporting to be such a certificate in the records, files and assets of Stoehr & Sons and Stoehr & Sons, Inc. prior to or on February 20, 1917 or thereafter (page 179; folio 325).

There was no record or evidence in the files of either the partnership or the New York company of any communication by letter or wireless or otherwise *from* the New York company to the Leipzig company in regard to the contract (page 179; folio 339). There was no evidence or record in those files that there had been any communica-

tion by letter or wireless or otherwise *from* the New York company *to* the Leipzig company in regard to shares (page 170, folios 325-326; page 179, folios 339-339½).

There was no record or evidence of any communication by either Hans E. Stoehr or Max W. Stoehr or any of the other persons *to* the Leipzig company or any of its officers or directors either by letter or wireless or otherwise regarding either the contract or the shares (pages 170-171; folios 326-327).

There was no record or evidence of any notice or request by letter or wireless or otherwise *from* the New York company or any of its officers *to* the Leipzig company or to Eduard Stoehr or Georg Stoehr in Germany regarding the payment for an instalment of the stock (page 179; folios 339-339½).

There was no evidence or record of any notice of any kind *from* the New York company or any of its officers *to* the Leipzig Company or any of its officers or directors in any way relating to the contract or the shares (page 179; folio 339½).

There was no record or evidence of any communication by letter or wireless or otherwise *from* either the Leipzig company or any officer or director of the Leipzig company in Germany *to* the New York company or any of its officers or directors, in regard either to the contract or the shares (page 170; folio 326; page 171; folio 327; page 179; folio 339½). There was no record or evidence of any kind in regard to any communication *from* the Leipzig company or any of its officers or directors *to* the New York company or any of its officers or directors in regard to the payment of any instalment under the contract, or any notice of any kind under or relating to the contract (page 171; folio 327; page 179; folio 339½).

There was no record or evidence of any communication by any one of the other persons engaged in the transaction *to* the Leipzig company or any of its officers or directors, or *from* the Leipzig company or any of its officers or directors *to* any one of those other persons, regarding the contract or the shares.

Finally, the records of the Botany showed, with reference to the rubber-stamp transfer of the 14,900 shares into the name of the New York company, that there was no certificate from Leipzig on file with the Botany, as required by the bylaws of the Botany company (page 137; folio 267). There was no evidence in the records of the Botany that there had ever been any deposit of the certificates representing the 14,900 shares with Georg Stoechr, who was then a director of the Botany, in Leipzig, Germany, required by the bylaws of the Botany company (page 137; folio 267).

The files of the Botany disclosed the fact that there was no record or evidence of any kind of any communication by the Leipzig company or any of its officers or directors to the Botany or any of its officers or directors in any way relating to the contract or the shares or their transfer on the books of the Botany into the name of the New York company, or in any way authorizing, sanctioning or approving, or even referring to the contract or said shares (pages 146-147; folios 284-285).

Indeed, the record shows that there was no communication by letter or wireless or otherwise either from the two Stoehrs in New York who were the members of the partnership or either of them to the two German partners or either of them, or from the two German partners or either of them to the two partners in New York or either of them, in regard to the transfer of the assets of the partnership to the New York company (page 171; folios 326-327; page 179; folio 339).

Nor was there any record or evidence of any communication by letter or wireless or otherwise from the New York company or any of its officers or directors to the two German partners or either of them regarding the transfer of the assets of the partnership to the New York company (pages 170-171; folios 326-327; page 179; folios 339-339½).

(N) Zimmerman testified unqualifiedly that the notation of the transfer of the 14,900 shares on the books of the Botany was made "to Stoechr & Sons, Incorporated, AT THE DIRECTION OF MR. HANS E. STOEHR" (page 137; folio 267).

"By the Court:

Q. I understand that when a Leipzig stockholder made a transfer, you got word of it from Mr. Georg Stoechr? You put his name in here *'By deposit of certificate with Georg Stoechr, director'* just the same?

The Witness: Yes".

(c) DIVIDENDS UPON THE 14,900 SHARES. In January or February 1915 the shares were transferred from the name of the Leipzig company, 10,000 to Hans E. Stoechr as trustee, and 4,900 to Max W. Stoechr as trustee (page 137; folio 268), but after the 1915 transfer the dividends were as before credited and paid to the Leipzig company during the years 1915 and 1916 (pages 137-138; folio 268).

After the notation on the book of the Botany by the rubber stamps of the transfer of the shares February 20, 1917, to the name of the New York company, the Botany credited the dividends to Stoechr & Sons Inc. IN SPECIAL ACCOUNT and "no dividends were paid out of that special account" (page 138; folio 268).

When asked by the Court "In whose name was the Special Account"? the witness Zimmerman responded: "Stoechr & Sons, Incorporated, Special Account" (page 138; folio 268).

(P) The bylaws of the Botany, governing the transfer of shares in Leipzig, required the receipt of the certificates for shares by a director resident in Leipzig, and that such director should "certify" the receipt of such certificates by him to the treasurer of the Botany in Passaic, or the same from a "vice-treasurer" in Leipzig. There was no vice-treasurer at Leipzig in 1914, 1915, 1916 or 1917. The only vice-treasurer elected during those years was Hans E. Stoechr, who was in the United States at that time, and that there was no vice-treasurer in Leipzig in any of the years from 1914 down to date (page 144; folio 280).

In order that this statement of facts may not be unnecessarily extended, we will not analyze here the evidence

as to (a) the previous history of the shares; (b) the facts in regard to the inability of the New York company to perform the contract; (c) the abundant opportunity of the two Stoehrs in this country, or their counsel, to communicate by wireless with the Leipzig corporation in January, February and March, 1917, regarding the contract, and the true reason why they did not do so; (d) the subsequent admissions and confessions of Hans E. Stoehr who was the chief actor in the whole transaction and the confession—in part misleading—of Heyn, counsel for the Botany and the New York company and for the Stoehrs, as to the purpose of the parties; (e) the real purpose of the two Stoehrs in this country; and (f) other relevant facts demonstrating the motives of the two Stoehrs in this country for the fabrication of the contract.

The facts bearing on these points are analyzed in the law points of our brief.

CERTAIN MISSTATEMENTS OF FACT MADE BY COUNSEL FOR THE APPELLANT:

(1) At the very beginning of his summary of facts, page 2, line 4, counsel for the plaintiffs states: "*the material facts are practically admitted*". That was doubtless meant to lead the Court to the belief that the appellant's statement of the facts gave *all* the facts. The most "material fact" in the case was the *intention of the parties* whose names are signed to the contract. The labored efforts of counsel for the plaintiff in Point III of his brief, subdivision 2 (pages 78-83), entitled:

"The argument based on the letter of Heyn to the Alien Property Custodian"

demonstrates that that very "material fact" and the conclusions properly deducible therefrom are not admitted. *The record facts*, the damning confession of Heyn, the two conclusive confessions of Hans E. Stoehr, the fact that there was no communication by wireless to or from the Leipzig Corporation or either of its directors or any two of its *procuristen* regarding the contract, could not of course

be denied. They were *not* admitted by the plaintiff upon the trial but were proved up to the hilt by the defendants. Only by ignoring these and other vital facts, in his statement of facts, and by seeking laboriously to explain away the admissions and confessions of Heyn and of Hans E. Stoehr, could counsel for the plaintiff argue with any plausibility that the "material facts" are practically admitted.

(2) On page 2 of his statement of facts counsel for the plaintiff states "Eduard and Georg Stoehr *lived* in Germany". He suppressed the material fact that they not only lived in Germany but were subjects of Germany and became alien enemies on the outbreak of war between the United States and Germany.

(3) On page 3 of his statement of facts counsel for the plaintiff said: "In conformity with this agreement the New York company acquired the property of Stoehr & Sons and *issued* all of its capital stock, amounting to \$250,000, *to the members of the partnership* of Stoehr & Sons" (rec., pp. 187-188). The 1,875 shares of stock representing the father's share in the partnership, and the 223.21 shares representing the brother Georg Stoehr's interest in the partnership, were *not* issued to Eduard and Georg Stoehr. They were not even put in their names. They were first momentarily issued in the name of Max W. Stoehr and in the next moment were surrendered and voting trust certificates for a like number of shares were issued in the name of Max W. Stoehr, trustee.

(4) On page 3 of his statement of facts counsel for the plaintiff states that "voting trust certificates were issued for the benefit of Eduard Stoehr and Georg Stoehr to Max W. Stoehr as trustee", but he suppresses the fact that the voting trustees consisted of the two Stoehrs in this country and their cousin Roehlig, with a provision for their kinsman de Liagre to be a successor trustee. He also suppresses the fact that the voting trust was to run for five years and that, thus, the parties to the scheme hoped to make ineffectual any seizure and sale of the transmogrified alien interests.

(5) Again on page 3 of his brief, referring to the issue of voting trust certificates to Max W. Stoehr as trustee for the two alien Stoehrs, counsel for the plaintiff states that voting trust certificates were issued to Hans E. Stoehr and to Max W. Stoehr "*covering their interest in the stock issued to them respectively*". Counsel for the plaintiff thus gives an exhibition of unconscious humour, for the scheme was palpably one designed to "*cover the interests*" OF THE TWO ALIEN STOEHR IN THE STOCK OF THE NEW YORK COMPANY—to cover it, if possible, from the eyes of Government officials, and so to tie it down and cover it up and over by a five-year voting trust dominated by the two Stoehrs and Roehlig and de Liagre that any seizure of it would be practically ineffectual and its sale impossible.

(6) Counsel for the appellant in his statement of facts (page 4) makes the following statement:

"On February 20, 1917 the Leipzig company entered into a contract with the New York company whereby it sold, assigned and transferred to the latter all its interest in these 14,900 shares, and *concurrently with the execution of this agreement Hans E. Stoehr and Max W. Stoehr AS TRUSTEES caused the shares to be transferred on the books of the Botany Worsted Mills to the New York company* (Rec. pp. 14-16)."

Aside from the palpable begging of the question involved in the assertion that "the Leipzig company entered into a contract with the New York company", the fact is that "concurrently with" the signing of that agreement, Hans E. Stoehr and Max W. Stoehr did not "*as trustees*" cause the shares to be transferred on the books of the Botany to the New York company. There is not a word or line of evidence in the case from the beginning to the end justifying or warranting that statement. There was no transfer or assignment of those shares by either Hans E. Stoehr or Max W. Stoehr *as trustees*, to the New York company, no execution or delivery of any stock power executed by Hans E. Stoehr *as trustee* or Max W. Stoehr *as*

trustee purporting to assign those shares to the New York company. Hans E. Stoehr and Max W. Stoehr *as trustees* made no such assignment and *as trustees* did not "cause" any assignment to be made to the New York company. That statement would naturally lead to the inference that the two Stoehrs in this country "*as trustees*" had brought about a valid assignment upon the books of the Botany of the shares to the New York company. There was no evidence in the record of any such assignment by those two *as trustees*. The statement that the two Stoehrs "*as trustees*" caused the shares to be transferred on the books of the Botany is entirely without any foundation in fact from the beginning to the end of the record.

The sole reference to the record by counsel for the appellant for that extraordinary statement is as follows: "Rec. pp. 14-16". That is a reference to the copy of the contract itself which is Exhibit 1 attached to the bill, and is found at pages 14 to 16 of the record. There is of course nothing in the contract or in that reference and nothing in the entire record to justify the statement that the two Stoehrs "*as trustees* caused the shares to be transferred on the books of the Botany Worsted Mills to the New York company".

(7) Again on page 5 of his statement of facts counsel for the plaintiff states that the New York company was organized under the supervision of Heyn, and that under Heyn's "supervision" the "*contract between it and the Leipzig company was executed*". Here again was a statement that the Leipzig company "executed" the contract, which of course entirely begged the question.

(8) At the bottom of page 5 and the top of page 6 of his statement of facts, counsel for the plaintiff states that the Alien Property Custodian, after the seizure of the certificates representing the alien-owned shares of the New York company, called for the resignations of its directors, and chose as its directors "James N. Wallace, Francis P. Garvin, Andrew B. Duvall and Paul Keiffer", whereas the fact is that Max W. Stoehr continued as a

director from March 20, 1918, the date when Messrs Wallace, Garvan and Duvall were elected directors, down to October 14, 1918, when his resignation as a director was accepted and Mr. Keiffer was elected a director in his place.

(9) On page 6 of his statement of facts, counsel for the plaintiff states that the shares of the Botany stock had never been listed on any stock exchange and had never been traded in the open market and that the stock had no quotable market value, and then says: "The same is true of the stock of the New York company." That statement ignores the fact that the stock of the New York company stood in the name of the voting trustees and was tied up for five years by the voting trust agreement under which the two Stoehrs on this side and their cousin Roehlig were the voting trustees.

(10) At the bottom of page 6 of his statement of facts, counsel for the plaintiff states that the Alien Property Custodian "without giving to the New York company any notice that the Alien Property Custodian intended to sell these shares of stock", gave public notice that he would offer these shares for sale to the highest bidder" etc, whereas the undisputed fact is that the New York company had full and formal notice of the proposed sale. Its officers and directors considered the question very fully and at a meeting of the directors held November 1, 1918, the board unanimously adopted a resolution that it was in the best interest of the company "to offer for sale at public auction 1290 shares of the stock of the Botany Worsted Mills owned and held by this company and standing in its name on the books of the Botany Worsted Mills", and the board authorized the officers of the company to offer said 1290 shares for sale as a portion of the lot consisting of 25,700 shares in all respects as is set forth in the order of sale and the terms and conditions of sale promulgated by the Alien Property Custodian (defendants' exhibit N-1, pages 273-274; folios 483-484). The terms of sale offered in evidence as plaintiff's exhibit 10 show explicitly in the last paragraph, numbered 15, the

offer of the New York company to sell said 1290 shares which were the only shares of the Botany held by the New York company the certificates for which were in this country.

(11) On page 6 of his statement of facts counsel for the plaintiff states that "the *only* American competitors of the Botany Worsted Mills were Forstmann & Huffmann of Passaic and the American Woolen Company". For that statement he refers to the record, page 117. The testimony at that very page of the record contradicts that statement and shows that "Our competitors *chiefly* are Forstmann & Huffmann, *in some products*, the American Woolen Company, and in part of our products, in yarn, there are quite a number of concerns which are in competition with us, and in dress goods there are a number in competition with us" (page 117; folio 228).

(12) Counsel for the appellant misrepresented the decision of Judge Hand in implying, and in fact stating, that Judge Hand based his decision upon the theory that the contract was a mere *option*. In his point I (bottom of page 13 and the top of page 14) counsel for the appellant said:

"The Court below has decided that no rights were acquired by Stoebr & Sons, Inc., to those shares on the theory that the instrument of February 20, 1917, was a mere executory contract *or an option*".

And again at the bottom of page 70 and the top of page 71 of his brief counsel for the appellant states that

"The ultimate ground for the decision of the Court below is that * * * 'the contract conveyed nothing to Stoebr & Sons, Inc.' (Rec. p. 318), the instrument being 'not a contract of purchase, *but only an option*,' (Rec. p. 314)".

That is an unfounded and misleading statement of Judge Hand's decision. It is obviously intended to convey the impression that Judge Hand's decision was based

almost entirely, if not solely, on the finding that the paper of February 20, 1917, was merely an option. But Judge Hand's opinion expressly stated that "the point is not in any sense critical" (page 314; folios 539-540).

Judge Hand had previously pointed out in his opinion that "*if the contract was intended as written* (page 312; folio 536), the plaintiff was entitled to some relief whether it was a sale or an option (*ib.*)". The important question became, therefore, whether the contract *was intended as written*. In deciding that question in the negative, Judge Hand relied hardly at all on the theory that the paper as written was, if intended as an agreement, merely an option. He said: "Besides, to give even a colorable plausibility to the bargain, the plaintiff's position requires the assumption that the contract was mutual in its obligations" (page 314; folio 540). It was in this connection that Judge Hand said "The point is not in any sense critical". It will be noted that he did not say that the *defendants'* position required the assumption that the contract was an option, but on the contrary expressly negatived such a statement. Yet the appellant's statement now is that the defendants' position requires that the contract be held merely to be an option and that Judge Hand decided the case on the option theory, which was not the fact.

(13) The appellant states in his brief (page 79) that "Judge Hand has expressly found that there was no fraud in carrying out the plan and that illegality could not be predicated of it".

This statement is inaccurate and misleading. Judge Hand did *not* "find that there was no fraud". On the contrary he expressly said, in his opinion, that if the contentions of the appellant were correct, and the contract were what on its face it purported to be, "*it was apparently a fraud*" (page 314; folio 539). This was for the reason that Hans E. Stoehr "was in the position of selling for an apparently inadequate consideration *to his family*, property in which other persons were interested as well as they" (page 314; folio 539).

Again Judge Hand said that, while the point was not in any sense critical, but perhaps worthy of notice, the contract "was pretty clearly not a contract of purchase, but an option" (page 314; folio 540). Then he added: "But as an option for five thousand dollars to purchase during a period of five years five million dollars of shares at prices which confessedly omitted an important element of value, the contract is *too open a fraud on the Leipzig company to admit even of argument*" (page 315; folio 541).

If it can be argued that Judge Hand absolved Hans E. Stoehr from the imputation of fraud it is only on the ground that, as we contend, there was no contract at all. The appellant is in this dilemma, therefore, that, if there were a genuine contract as he contends, Judge Hand, far from finding that "there was no fraud in carrying out the plan," expressly branded it as an apparent fraud. If, on the other hand, there was no fraud, it was only for the reason that there was no intention to convey the beneficial ownership in the shares, and on that hypothesis the appellant's whole case fails.

ANALYSIS OF THE OPINION OF JUDGE HAND

The following is a brief analysis of the opinion of Judge Hand dismissing the complainant's bill and supplemental bill:

1. The suit must be regarded as dependent for jurisdiction upon section 9 of *The Trading with the Enemy Act* (page 319, folio 532). The plaintiff has no standing unless it be under section 9 of *The Trading with the Enemy Act* or unless the Act be unconstitutional (page 311; folio 534).

2. *The Trading with the Enemy Act*, and in particular the provisions thereof giving the Alien Property Custodian power of initial sequestration without a prior judicial determination that the sequestered property is enemy property, is constitutional (page 311; folios 534, 535).

3. The court *assumed for argument's sake* that

(a) A shareholder may bring a representative suit and that plaintiff has here shown a situation justifying his recognition in that capacity.

(b) That Hans E. Stoehr had a general authority for the execution of contracts for the sale of such property as the shares for a consideration such as was set forth in the contract of February 20, 1917, though that fact was in no way proved, and

(c) That "title" to the shares vested in Stoehr & Sons, Inc. in spite of irregularity under the by-laws of the Botany Mills (page 312; folios 535-536).

4. The issue then becomes what rights the Alien Property Custodian got by his seizure of the shares. That question concerns (a) first the rights of the Leipzig Company under the contract of February 20, 1917, and (b) whether the belligerent rights of the United States were greater than the rights of the Leipzig Company *inter partes* (page 312; folio 536).

5. If the contract was valid at all against the United States and *if it was intended as written*, the plaintiff was entitled to some relief, whether the contract was a sale or an option to sell, because if it were a sale the Leipzig Company must sell under its vendor's lien and such a sale would be free from the limitations of sales under section 12 as amended, and if it were an option it terminated only on sixty days' notice, and no such notice had been given (pages 312-313; folios 536-537).

6. Assuming first that the contract would be valid against the United States, the Court held (*and this was the real basis of the decision*) that the contract was not intended to represent the real purpose of the parties at all but to serve as a cover for another purpose (page 315; folio 541), that the beneficial ownership of the shares was always intended to remain in the Leipzig Company and that there never was any transfer at all (page

317; folio 544). That conclusion was based on the following reasons:

(a) The contract from the point of view of the Leipzig Company "gained nothing" for that company, since the consideration for the sale could be easily discovered and captured and the contract could therefore not be regarded as a sacrifice sale (pages 313-314; folios 538-539).

(b) The contract was not a commercial transaction for the reason that

i. The consideration was inadequate (page 314; folio 539).

ii. If the contract was intended as written, Hans E. Stoehr was in the position of selling for an apparently inadequate consideration to his family, property in which other persons were interested as well as they, and was therefore committing a fraud (page 314; folios 539-540).

iii. The plaintiff's position requires the assumption that the contract was mutual in its obligations, the Court holding upon this point that while it was not in any sense critical, the contract was probably nothing but an option and as an option the contract would be an open fraud upon the Leipzig Company (pages 314-315; folios 540-541).

iv. The written statements of Hans E. Stoehr and Heyn disclose beyond question the real purpose of the contract (pages 315-317; folios 541-544).

7. In view of the completeness of the proof that the beneficial ownership of the shares *was always intended to remain in the Leipzig company* and that there was never any transfer at all, the question whether the contract was invalid as a fraud on the belligerent rights of the United States "was not critical." On that point the Court held, however, that if the contract had been intended as written it would not have been invalid as against the United States merely for the reason that it was made on the eve of war (pages 317-319; folios 544-545).

POINT I

The contract was not intended by the parties to take effect according to its terms, but was in fact a sham and a device for the purpose of transferring from an anticipated enemy alien to a corporation of the United States the apparent legal title to the stock, without transferring or intending to transfer the real ownership of the stock

I

In this point we will assume, although, as will be demonstrated in Point III, such was not the fact, that the contract between the New York and the Leipzig corporation for the sale and the subsequent transfer of the shares on the books of the Botany into the name of the New York company, would have transferred to the New York company *an equitable right* to the shares, *if the contract had expressed the real intention of the parties*. For the purpose of this point, we will treat the contract as though there were no executory features in it such as would authorize its annulment because of the existence of war between the governments of which the contracting parties were nationals, although, as will be demonstrated in Point V, there were many executory features in the contract which rendered it void upon the occurrence of war.

Assuming the foregoing, we will in this point demonstrate that the contract *was never intended by the parties to take effect according to its terms*, but was in fact a sham and a device for the purpose of transferring from an anticipated enemy alien to a corporation of the United States the legal title to the stock, with the intent that upon the cessation of war, then imminent, or upon the occurrence of other conditions which would make it possible and practicable, the New York company would re-transfer to the Leipzig corporation that which it had received under the contract, and the parties would be restored to their former positions. The New York com-

pany was in the meantime to hold the stock in reality in trust for the Leipzig company, the real owner. In this view of the facts, we will contend that the contract never became in point of law a real contract and that it would not have divested the Leipzig corporation of its ownership in the stock, nor vest such ownership in the New York company, even if war had not been declared between the United States and Germany on April 6, 1917.

An analysis of the contract discloses certain extraordinary features unusual in genuine business transactions between parties dealing at arms length. It is of a nature such as no contract could or would reasonably be between sane and prudent persons dealing on a purely business basis. The true nature of the contract as a business transaction may be seen by a statement of the relative benefits accruing to the parties upon the facts as they were on February 20, 1917, if we assume that the contract was an honest transaction *of the nature it purported to be*.

II

BENEFITS TO THE NEW YORK COMPANY

(1) Immediate transfer to it of the legal title and beneficial ownership of the shares (plaintiff's exhibit 8, page 202; folio 380; printed at pages 14-16; folios 25-29). The total stock of the Botany was 36,000 shares. The voting control of Botany was and is 18,001 shares. One day previous to the date of the contract, namely on February 19, 1917, the New York company had received by a transfer to it of the assets of the partnership, the legal title to 5090 shares. Hence the contract attempted to transfer to the New York company sufficient additional shares to give the New York company the legal title and beneficial ownership of 20,590 shares, more than sufficient to elect and control the directorate of the Botany and to determine all questions which might be decided by its stockholders.

The next stockholders' election would regularly have been held on the third Tuesday of March 1917 (by-laws of the Botany, defendants' exhibit J, article XIII, paragraph

1, page 226; folio 427). The by-laws provided that the "annual meeting of the stockholders of the company shall be held on the third Tuesday of March of each year at 12 o'clock noon for the election of new directors and other business". A stockholders' meeting was to be held, and in fact was held, about four weeks after the execution of the contract (defendants' exhibit V, page 243; folio 445). Hence under that contract the New York company was given practically immediate right to put in as directors of the Botany its own nominees solely, and to control solely the policy of the Botany.

(2) Immediate right to the New York company to receive all dividends payable subsequent to February 20, 1917 on the shares until that stock should be re-transferred into the name of the Leipzig corporation on the books of the Botany pursuant to the provisions of the contract.

The dividends so covered by that right included those for the fiscal year ended November 30, 1916, which, under the by-laws, would be determined prior to or at the time of the annual meeting three or four weeks after the execution of the contract. As was shown by defendants' exhibit T (pages 238-239; folio 443) the dividend upon the shares, payable April 15, 1917, amounted to \$208,600.

That dividend of \$208,600 was an annual dividend of fourteen per cent (14%), declared by the stockholders, at their annual stockholders' meeting, after the approval of the balance sheet of the company for the fiscal year ended November 30, 1916. The contract also entitled the New York company to receive the regular semi-annual dividend of three per cent (3%), payable September 15, 1917, which, as shown by defendants' exhibit T, amounted on the shares to \$44,760.

(3) Permanent ownership of the shares upon payment therefor in five annual instalments of the purchase price. That purchase price was provided by the contract to be based upon the book value of the shares as shown by the Botany books, *excluding all good will*. The first instalment was one-fifth of the book value as of November 30,

1917, plus the amount of the dividends to be received by the New York company on all the shares up to the time of that first payment. The second instalment was to be one-fifth as of November 30, 1918, plus an amount equal to the dividends to be received by the New York company during the second year upon four-fifths of the shares, and so on.

(4) If the contract had actually been what on its face it purported to be, it would have been a monstrous fraud upon the Leipzig company for the reason that it was provided in the contract, paragraph second, sub-paragraph (c), that

"In arriving at the amount of each instalment for each of said years, the net worth of the hard assets of the Botany Worsted Mills, after deducting the total liabilities, shall be taken as the basis of computation of the value per share, AND NO ALLOWANCE OR INCREASE SHALL BE MADE ON SUCH INSTALMENT FOR GOOD WILL" (page 15, folio 27).

And yet the complainant himself testified that

"The mill had grown in the 1890's very rapidly and had passed over the very bad years of 1900 in very good condition and had grown to be a plant employing almost 7000 people" (page 105; folio 202).

Up to 1916 "it was very prosperous" (page 105; folio 202). The plant has about 140 acres. It has 2100 and some odd looms, about 90,000 worsted spindles and 10,000 woolen spindles (page 105; folio 202).

"We prided ourselves that we were very efficient in every way and very well equipped and that the machinery was kept in very good order and it has always been stated as such" (pages 105-106; folio 203).

The turnover in 1917 was \$28,000,000 (page 106; folio 203).

All the evidence in the case shows that the company had a highly prosperous and successful business, which necessarily *and in fact* enjoyed a large amount of good

will. Hans E. Stoeck, in selling to himself and his associates in the New York company the stock control of the company on the basis of the value of its "hard assets", would be transferring those shares of stock at a grossly inadequate price. It is absurd to say that one holding the control of a company like the Botany would sell stock which enabled the buyer to obtain the control on the basis purely of the value of the tangible assets, WITH NO ALLOWANCE FOR GOOD WILL, TRADE MARKS, TRADE NAME, OR ANY OF THE OTHER FACTORS THAT ENTER INTO THE GOOD WILL OF A WELL-ESTABLISHED AND HIGHLY PROSPEROUS BUSINESS.

III

SHADOWY RIGHTS TO THE LEIPZIG CORPORATION

(1) Receipt of \$5,000 as expressed by the contract, but which was never paid to the Leipzig corporation, and was the subject merely of a bookkeeping entry.

(2) The privilege of receiving the purchase price had the New York company elected to receive the shares and make the payments called for by the contract.

(3) In case the New York company should fail to pay any instalment of the purchase price, to retain the certificates for such shares and have the shares themselves re-transferred upon the books of the Botany into the name of the Leipzig corporation.

The net worth of the Botany at the time of the execution of the contract was made up of (a) its capital, (b) its paid-in surplus, and (c) its surplus from operations (plaintiff's exhibit 11, pages 206-207; folios 397-399). The financial statement of the Botany as of November 30, 1917, shows that in addition to the capital of \$3,500,000 there was "a paid-in surplus" of \$1,050,000, and an "actual surplus from operations" of \$6,797,356.78 (plaintiff's exhibit 11). Hence the net worth of the Botany in February 1917, with no allowance for good-will, trade marks or trade names, would be approximately the total of these sums or \$11,447,356.78.

The earnings of the Botany and the condition of its assets and its surplus were of course well known to the ostensible contracting parties. The book value of the stock, as of November 30, 1917, was, as shown in defendants' exhibit U, over \$317 per share (pages 240-241; folio 444). *There was therefore no increase of price payable under the contract* BECAUSE OF THE TERMS OF CREDIT. The amount which the seller would receive in case the purchase price were paid would be no more than the actual value exclusive of good will, plus the amount of dividends.

It is to be noted, however, that there was *no obligation* on the part of the New York company to pay for the stock if it did not choose to do so. The only penalty for non-payment provided in the contract was to be the loss of the record title to the shares for which payment was not made, plus the loss of the \$5,000, in fact only a paper credit, if even that (testimony, page 138; folios 268-269).

The aggregate annual dividends on the Botany stock had for several years previously been very large and the company was in a very prosperous condition (testimony of Max W. Stoehr, pages 105-106; folios 202-204). The condition of the company, at the time of the execution of the contract warranted the belief, justified by the event, that the previous dividends would be continued, if not exceeded, for the next succeeding years. The amount of the dividends on the shares, between February 20, 1917 and February 20, 1918, was in fact \$253,300 (defendants' exhibit U, pages 240-241; folio 444). The contract contemplated that dividends on the shares, so long as they stood in the name of the New York company, should be received by the New York company, and be retained by it, *irrespective of any subsequent default*. The only penalty for default was to be the loss of the privilege to receive permanent ownership of the shares, and the "re-transfer" of the shares back into the name of the Leipzig company on the books of the Botany company.

The agreement therefore *contemplated by its expressed terms*, viewed in conjunction with the surrounding facts and circumstances known to both ostensible contracting

parties, that the New York company should have the privilege, if it so desired, of receiving the sum of \$253,300, in dividends from the Botany company, upon an initial paper credit of \$5,000, and that privilege was one which, under the terms of the contract, the Leipzig company could in no way destroy. The most the Leipzig company could do was, by a demand for non-payment of the one-fifth purchase price, due February 20, 1918, to put the New York company in such default that it should be deprived of *further* dividends which might be payable *more than sixty days after such a demand*. But it will not be overlooked that the New York company would be entitled *under the express terms* of the alleged contract to receive *all* further dividends paid within that sixty day period. The New York company could not be put in default until a demand was made by the Leipzig company for the first one-fifth of the purchase price. The Leipzig company could not make that demand before February 20, 1918. And the New York company would not be in default until sixty days *after* the making of such demand, and the New York company would be entitled to *all* the dividends on the stock up to the expiration of that sixty days default period.

The Botany dividends were payable and paid about the 15th of April and the 15th of September in each year (Botany by-laws, defendants' exhibit J, pages 225-228; folios 427-429). With the New York company in control of the board of directors of the Botany, as it would be under the record ownership of the shares, combined with the other shares held by the New York company, the time of payment of the Botany dividends could easily be fixed so as to fall between February 20 and April 20 in each year, so as to come within the period *BEFORE WHICH* the New York company would be in default, and the Leipzig corporation could be entitled to the "re-transfer" of the shares, the purchase price of which was in default, back into the Leipzig corporation's name.

Hence as a sheer matter of fact, the contract put it into the power of the New York company to receive dividends, amounting on the shares, for the year 1917, to \$253,300 (defendants' exhibit U, pages 240-241; folio 444), and also

for the year 1918, at the actual declared rate of twenty-five per cent (25%), amounting to \$372,500 (defendants' exhibit U), making a total of \$625,800 to be received between February 20, 1917 and February 20, 1918, *without any compensating payment to the Leipzig corporation whatever.*

But more astounding still, the contract expressly provided in its concluding fifth paragraph (page 16; folios 28-29) that in the event that any of the annual instalments should not be paid when due, the Leipzig company might notify the New York company "*in writing*" that it required the payment of the instalment then due and if the New York company should not *within sixty days* after such a demand pay the instalment, then the shares of stock or any remaining balance of stock was to be "forthwith re-transferred" to the Leipzig company, all the rights of the New York company to the stock were to cease and "the Leipzig company shall retain the five thousand dollars (\$5,000) paid on account as hereinbefore recited, IN FULL SETTLEMENT OF ANY CLAIM AGAINST THE NEW YORK COMPANY, AND THEREUPON NEITHER OF SAID COMPANIES SHALL HAVE ANY FURTHER CLAIM AGAINST THE OTHER ARISING UNDER OR BY REASON OF THIS AGREEMENT".

A contract which must necessarily or could have had the effect stated above, was either intended as a matter of fact to make an actual gift of \$625,800 by the alleged seller to the alleged buyer, or there was between the parties an understanding not expressed in the instrument whereby the buyer was to perform for the seller services of some character, or to give to the seller a consideration of some sort, which the seller deemed worth the amount of those dividends, or the parties DID NOT REALLY INTEND THAT THE BUYER SHOULD HAVE THE PRIVILEGE OF KEEPING THOSE DIVIDENDS, BUT INTENDED THAT THE DIVIDENDS SHOULD BE HELD IN TRUST FOR THE SELLER UPON SOME SECRET UNDERSTANDING, OR THE PARTIES IN SOME OTHER FORM HAD SOME SECRET UNDERSTANDING OR AGREEMENT NOT EXPRESSED IN THE CONTRACT WHICH WHOLLY NULLIFIED THE TERMS OF THE CONTRACT.

It should be borne in mind in this connection that the contract (page 14, folios 25-29) *expressly* on its face contemplated the receipt of the dividends by the New York company, for it provided in article second, subdivision (d), that in addition to the book value of the shares there "shall be taken into consideration and account the amount of the dividends *received* by the New York company during the said five years from date in the following manner: *During the first year the amount of the entire dividends received by the New York company on the said shares* shall be added to the purchase price and shall be paid with the first instalment; *during the second year four-fifths of the entire dividends received on said shares of stock by the New York company*; during the third year three-fifths of said dividends; during the fourth year two-fifths of said dividends, and during the fifth year one-fifth of said dividends *so received on said shares* shall be added to the annual instalments of the purchase price and shall become part of said purchase price and shall be payable with each of said instalments at the end of each of said respective years."

The Leipzig company never knew of the existence of the contract. But assuming for the purpose of this discussion that it *had* known of the existence of the contract, it would never, *in the absence of a secret understanding*, have agreed to the terms of its fifth paragraph which expressly provided that in the event of the termination of the contract at the option of the Leipzig company at the end of sixty days' notice, the Leipzig company should retain the \$5,000 "*in full settlement of any claim against the New York company* AND THEREUPON NEITHER OF THE SAID COMPANIES SHALL HAVE ANY FURTHER CLAIM AGAINST THE OTHER ARISING UNDER OR BY REASON OF THIS AGREEMENT."

Under the contract the purchase price of the shares was to be determined by the book value of the shares as shown by the books of the Botany (paragraph second (a)). The purchase price was payable in five instalments, the first in one year from the date of the agreement, February 20, 1918, and the subsequent instalments respectively in two,

three, four and five years from February 20, 1917 (contract paragraph second (a)). From the last or fifth instalment the \$5,000, recited in the alleged contract, with interest at six per cent. from the date of the agreement, was to be deducted (paragraph second (a)).

The provisions of the contract, paragraph second (c), that only "the net worth of the 'HARD ASSETS' of the Botany should be taken as the basis of the share price and that **NO ALLOWANCE OR INCREASE SHALL BE MADE ON SUCH INSTALMENT FOR GOOD WILL**", demonstrates that the contract would be a fraud on the Leipzig company, if it was meant to be carried out as written.

IV

THE AMOUNT OF THE PAYMENTS TO BE MADE BY THE NEW YORK COMPANY

The records of the Botany show what would have been the obligations assumed by the New York company under the contract had the parties meant the contract as written. The book value of the shares on February 20, 1918, one year from the date of the contract, taken as of November 30, 1917, as expressly provided by the contract, and as shown by defendants' exhibit U (pages 240-241; folio 444), was \$4,737,937.46.

The expression "hard assets" was never used in the bookkeeping of the Botany and was an unfamiliar term to the officers and accountants of the company (page 142; folio 276). The book value was computed, as shown on defendants' exhibit U, by taking the sum of the capital stock, paid-in surplus and surplus from operations, and dividing that aggregate by 36,000, the total number of shares outstanding. Defendants' exhibit U showed the book value of the shares on February 20, 1918, and February 20, 1919. In making up defendants' exhibit U, which demonstrated how the provisions of the contract would have worked out, no account was taken of trade-marks or patents or anything other than inventory, accounts re-

receivable, real estate and plant, and *no allowance whatever made for good will* (testimony pages 142-143; folios 276-277).

One-fifth of \$4,737,937.46, the book value of the shares (the first instalment payable February 20, 1918) was \$947,587.49. Dividends declared and paid on the shares from February 20, 1917 to February 20, 1918, amounted, as shown on defendants' exhibit U, to \$253,300. The total of the first payment due under the contract on February 20, 1918, would have amounted, therefore, as demonstrated by defendants' exhibit U, to \$1,200,887.49.

On the same basis the book value of the shares on February 20, 1919, as of November 30, 1918, was, as shown by defendants' exhibit U, \$5,199,559.58. One-fifth of that book value (the second instalment payable February 20, 1919) would be \$1,039,911.91. Dividends declared and paid on the shares from February 20, 1918, to February 20, 1919, amounted, as shown by defendants' exhibit U, to \$298,000. The total of the second instalment of the purchase price due on February 20, 1919, under the terms of the contract, was, as shown by defendants' exhibit U, \$1,337,911.91.

On the same basis the book value of the shares on February 20, 1920, as of November 30, 1919, would be \$6,514,088.61. One-fifth of that book value (the third instalment payable February 20, 1920) would be \$1,302,817.72. Add three-fifths of dividends amounting to \$372,000 (25%) paid on the 14,900 shares February 20, 1919, to February 20, 1920, being \$223,500. The total payment that would be due February 20, 1920, would be \$1,526,317.72. (This computation is based upon plaintiff's exhibit 12, pages 208-209; folio 400.)

It is obvious, therefore, that by the terms of the contract the New York company purported to assume an obligation to pay in cash on February 20, 1918, \$1,200,887.49, on February 20, 1919 the sum of \$1,337,911.91 and on February 20, 1920, the sum of \$1,526,317.72, together with two subsequent instalments in the two following years, which certainly would be much greater than the first instalments.

V

This leads to a consideration of the INABILITY OF THE NEW YORK COMPANY TO MEET SUCH OBLIGATIONS.

The balance sheet of the New York company as of February 20, 1917 (plaintiff's exhibit 13; folio 401), showed nominal assets of \$2,848,058.32. The liabilities, as shown on that balance sheet, were \$1,641,528.79. The apparent net worth of the company as of that date was accordingly \$1,206,529.53. But among the assets, as shown by the balance sheet, were a number of assets of doubtful value, and were so designated (plaintiff's exhibit 13). Deducting the conceded doubtful assets, as shown by plaintiff's exhibit 13, of \$117,020.68, from the apparent net worth of the company, on February 20, 1917, in the sum of \$1,206,529.53, left net worth as shown by the books of the company, on February 20, 1917, of \$1,089,508.85 (plaintiff's exhibit 13, first column).

We have stated that those were only apparent values. That they were but apparent values, at least so far as the ability to make large payments or to provide the money for large payments was concerned, is shown by the fact that among the assets of the company, shown on the balance sheet, were 6090 shares of the Botany stock, which are designated on the balance sheet as good assets. The 6090 shares were carried at the value of \$975,867. Of the 6090 shares, certificates for only 1290 shares were in this country in possession of the company (testimony of Hesse, page 175; folio 334). It would have been impossible to realize any money by borrowing or otherwise upon shares of stock the certificates for which were in Germany. The 1290 shares represented only approximately one-fifth of the total holdings of the company in the Botany stock. The value of that asset, in so far as it could be used for the purpose of realizing money to meet the obligations of the company, was approximately \$195,173.40. In other words, the "net worth"

of the company at that time would have to be reduced by the sum of \$780,693.60, in order to arrive at the true net worth even on the books which could properly be used to ascertain the ability of the company to meet its financial obligations.

Any banker would compel the deduction of the sum of \$780,693.60, representing the value of the shares of stock of the Botany, as shown on the books of the company, certificates for which were in Germany. That would reduce the net worth of the company on its books on February 20, 1917, to \$308,815.25 (plaintiff's exhibit 13; folio 401). It will also be observed that among the current assets of the company, as of February 20, 1917, there was but \$14,537.07 in cash, and a merchandise inventory of \$1,264,538.14, *which was not bankable collateral at all.*

It will thus be seen that a company having a net worth for borrowing purposes on its books of approximately \$308,815.25, but with hardly any real borrowing power so far as bankable security went, purported to incur an obligation to purchase shares of stock at a purchase price of much over \$6,000,000, payable in five annual instalments of from one and a quarter million to one and one-half million dollars each.

Plaintiff's exhibit 13 (folio 401) gives in condensed form the net worth of the company, after deducting doubtful assets, upon the following dates in addition to February 20, 1917: December 31, 1917, February 20, 1918, March 20, 1918, December 31, 1918, February 20, 1919 and December 31, 1919. As of February 20, 1918, the apparent net worth of the company, on the basis above stated, was \$797,555.60 (plaintiff's exhibit 13). That amount included "merchandise," which was not bankable collateral at all, in the sum of \$392,036.28. On that date the 6090 shares of stock of the Botany were, as before, carried at the sum of \$975,867. Hence the company was in no position on February 20, 1918 to borrow much money of a bank, for, making the proper deduction for the certificates of stock that were in Germany, it will be seen that the net worth of the company, as of February 20, 1918, had practically disappeared, amounting to only

\$16,862. The amount payable under the contract on February 20, 1918, as shown above, was \$1,200,887.49.

Again, the actual net worth, as of February 20, 1919, of the company, as shown on the balance sheet (plaintiff's exhibit 13), was \$912,220.12. That amount again included in the assets merchandise in the sum of \$392,036.28 (plaintiff's exhibit 13, sixth column). Again, that also included the 6090 shares of the Botany stock, at the same valuation of \$975,867. Again deducting the value of the 4800 shares in Germany out of the 6,090 from the net worth of the company, as shown by the balance sheet, we find that the real net worth of the company, on February 20, 1919, the date of the second theoretical annual payment on the shares, available for the purpose of meeting the obligation, is \$131,526.52. That would be the net worth of the company at the time it would have been called upon to pay the second instalment, as shown by defendants' exhibit U. of \$1,337,911.91.

The actual net worth as of December 31, 1919, of the company as shown on the balance sheet (plaintiff's exhibit 13; folio 401) was \$1,082,133.70. This amount again included the 6,090 shares of the Botany stock at the same valuation of \$975,867. Again deducting the value of the 4800 shares in Germany out of the total of 6,090 from the net worth of the company as shown by the balance sheet, we find that the worth of the company on December 31, 1919, less than two months prior to the date of the third theoretical annual payment on the shares available for the purpose of meeting the obligation, is reduced to \$301,440.10. That would be the amount of the net worth of the company shortly prior to the time it would have been called upon to pay the third instalment of \$1,526,317.72 (plaintiff's exhibit 12, pages 208-209; folio 400).

VI

We now come to another significant fact, which demonstrates that the contract and the transfer of the shares to the New York company on the books

of the Botany, were not intended as a *bona fide* transfer, and that is that THE DIVIDENDS PAYABLE IN THE YEAR ENDING NOVEMBER 30, 1917, WERE NOT PAID TO THE NEW YORK COMPANY.

The New York company was on and after February 20, 1917, and until after the end of the fiscal year, the record owner of those shares. Had it been the real owner of those shares, the dividends declared and payable during that period would have been payable to it. The contract expressly contemplated such payment. But, as shown by defendants' exhibit T (pages 238-239; folio 443), no such payment was made. The fourteen per cent. dividend declared and payable April 15, 1917, amounted to \$208,600. The regular semi-annual three per cent. dividend provided by the by-laws (defendants' exhibit J, article XXI, paragraph 1 and paragraph 2 (c), page 228; folio 429), declared and payable September 15, 1917, amounted to \$44,700. Those two dividends amounted to \$253,300. *They were not paid to the New York Company.* They were credited in an account entitled "*Stoehr & Sons Inc. Special*", on the books of the Botany. The first credit on the books of the Botany in that *Special Account*, as shown by defendants' exhibit T, was under date of March 31, 1917. The date of the credit in the *Special Account* upon the books of the Botany of the \$44,700 was October 31, 1917.

As shown by defendants' exhibit T, the dividends so credited to *Stoehr & Sons Inc. Special Account* were paid to the Alien Property Custodian by the Botany company on April 25, 1918, as the property of the Leipzig corporation, an alien enemy, and not as the property of the New York corporation.

The fact that those dividends were not paid to the New York company, but were specially credited in a *special account* specially opened, would seem to show, taken into consideration with the other facts referred to, that the New York company was not deemed even by the two Stoehrs in the United States, or by the officers and directors of the New York company, the beneficial owner of the shares. There was no reason shown by the plaintiff for

setting aside and holding those dividends in that special account. If the contract was what it purported to be, and if the transfer to the New York company had been a real and *bona fide* transfer, vesting the beneficial ownership of the stock in the New York company, there is no reason, so far as the record shows, why the New York company should not have received those dividends, as expressly provided in the contract.

The reason those dividends were credited in that special account was that Hans E. Stoehr, as the chief actor in the fabrication of the alleged contract, *did not intend to effect any transfer of property beyond such as was absolutely necessary to give an apparent title to the shares on the books of the Botany to the New York company*. That fact tends to establish that the contract and the attempted transfer thereunder, were not a *bona fide* contract and transfer, and that the whole transaction purported to be one thing on its face and was in reality another, and that it was a mere sham.

VII

Although in February 1917 diplomatic relations between Germany and the United States had been severed it was clearly established that actual commercial communications by wireless between the two countries were not only possible *but took place in large volume*.

It was proved by *uncontradicted testimony* that communication between Germany and the United States continued by wireless messages right up to April 6, 1917, the date of America's entry into the war (testimony of Barrand, page 157; folio 304). Messages were sent from the United States by wireless to, and were received in Germany, and were sent from Germany to the United States by wireless, and received in the United States, up to that date (testimony, page 158; folio 304).

The defendants proved upon the trial by the most conclusive testimony that wireless messages were sent to and received from Germany *and money transferred by wireless* IN LARGE AMOUNTS between Germany and the United States

during January, February, March and right up to April 6, 1917. The superintendent of tariffs of the Postal Telegraph Company, which operated the Sayville wireless station, and the superintendent of tariffs and officers of the Western Union Telegraph Company, which operated the Tuckerton wireless station, testified to that effect, as did also one of the vice-presidents of the National Bank of Commerce in New York, who had sent and received such messages and made such transmissions of money by wireless and testified as to the practise of other banks and companies during that time.

The defendants' proof on this subject was conclusive. It is summarized in the appendix submitted with this brief. It is there shown that *business* communications were censored in order to be sure that military information might not be conveyed to Germany. Whether the wireless messages were open messages or in code, they were accompanied by proof, satisfactory to the Government, that they dealt with business matters only (testimony of Barrand, summarized in appendix). Hence though the New York company could have readily communicated by wireless with the Leipzig company, such communication would have made a record, which is precisely what the New York company and the two Stochrs in New York wished to avoid.

Why was the contract, drawn in a formal manner, signed in the name of the Leipzig corporation by Hans E. Stochr personally, without any specific authority from, and without any communication with the Leipzig corporation?

The total value in dollars of the 12,000,000 marks share capital of the Leipzig corporation at that time was some \$2,047,500. The value in dollars of the 14,900 shares, even excluding good-will—a very vital part of the value—was over \$6,000,000. Hence we have a contract dealing with an asset of the Leipzig corporation over three times the *then* total value in dollars of the Leipzig corporation's share capital. Is there any reasonable explanation of the making of that contract in the particular manner in which it was attempted to be made rather than in the usual and normal manner by direct

communication between Hans E. Stoehr and his brother Max W. Stoehr or the New York corporation, and the Leipzig corporation, EXCEPT THE FACT THAT IT WOULD BE DANGEROUS—FATAL TO THE SCHEME, IF DISCOVERED—TO EXPLAIN SATISFACTORILY TO THE GERMAN COMPANY IN AN OPEN TELEGRAM THE TRUE NATURE OF THE TRANSACTION IN SUCH A WAY THAT THE GERMAN COMPANY WOULD HAVE APPROVED OF IT? Does not the form of the contract itself, including its execution by Hans E. Stoehr, as testified by Max W. Stoehr, under the *implied* authority of the Leipzig corporation, necessitate the conclusion that he was *obliged* to take the bull by the horns and make the contract for the Leipzig corporation on his own initiative, without *any* authority, trusting to make the proper explanation to the Leipzig corporation subsequently, BECAUSE IT WAS IMPOSSIBLE FOR HIM TO EXPLAIN OPENLY TO THE LEIPZIG CORPORATION THE REAL PURPOSE OF THE CONTRACT AND BECAUSE IT WAS IMPOSSIBLE FOR HIM TO OBTAIN FROM THE LEIPZIG CORPORATION AUTHORIZATION FOR THE CONTRACT, WITHOUT SUCH EXPLANATION?

VIII

In any other aspect of the case the contract would be a fraud upon the Leipzig corporation. All the risk was taken by the Leipzig corporation. No risk was assumed by the New York company. The contract vested the voting rights in the shares in the New York company. Those shares, together with the 5,690 already held by the New York company, gave the New York company voting rights in 20,590 shares of the stock. That gave the New York company the absolute right to nominate, elect, control and remove at will the officers and directors of the Botany. It placed it absolutely in the power of the New York company to fix the salaries of officers, vote bonuses and extra compensation, pile up reserves for depreciation, charge off any amounts they desired for bad accounts, and fix absolutely, in its uncontrolled discretion, for the period of five years covered by the contract, *the book value of its stock*. AND BOOK-VALUE WAS TO BE THE BASIS OF PAYMENT FOR THE 14,900 SHARES NAMED IN THE CONTRACT!

A more palpable fraud upon—theft from—the Leipzig corporation, *if the contract was what it purported on its face to be*, it would be difficult to imagine.

If there had been no war, the contract would have been repudiated by the Leipzig corporation as a swindle.

If there had been an absolute identity in the stockholders of the New York company and of the Leipzig corporation, the contract would still have been illegal and a fraud. But there was no such identity. The entire Stoeck family did not own even a majority of the stock of the Leipzig company.

The two Stoecks in Germany in 1917 were only a minority of the board.

To say that the Leipzig corporation, unless its directors were lunatics, would have authorized or approved such a contract as that of February 20, 1917, is the height of absurdity. At that time marks were going down and dollars were not. At that time Germany was feeling the pinch of the blockade. It is obvious that owing to the shortage of wool and the stringency of the blockade, the business of the Leipzig corporation must have been suffering. The value of its share capital at that time in dollars was approximately \$2,047,500. The approximate value of the 14,900 shares at that time was much more than \$6,000,000.

If in February 1917 America's entry into the war had not been imminent, that \$6,000,000 American asset, represented by the 14,900 shares, must have been "the one bright spot" on the business horizon of the Leipzig corporation. It is unthinkable that sane directors of that corporation would have sanctioned such a contract *if it represented the real intentions of both parties*. If the United States had not entered the war, of course the contract would have been repudiated. That the contract was concocted by the two Stoecks and their counsel in this country for the purpose of forestalling the action of the United States is the scar then known to be inevitable is confessed in the Heyn & Covington letter, *approved by Hans E. Stoeck*, the chief conspirator. That letter will be considered presently.

IX

On December 6, 1917, Max W. Stoechr swore to the report in the name of the New York company to the Alien Property Custodian (page 104; folio 201). Counsel for the complainant contends that the report was evidence of the good faith of the officers of the New York company.

That sworn report made was misleading and deceptive.

On December 11, 1917, the Botany company made a report, sworn to by its president Prehn, to the Alien Property Custodian (defendants' exhibit P-1, pages 274-276; folios 487-490). THE BOTANY REPORT REFERRED TO THE CONTRACT AND THE 14,900 SHARES. The report of the New York company, sworn to by Max W. Stoechr (plaintiff's exhibit 4, pages 189-196; folios 361-364a), MADE NO REFERENCE TO THE CONTRACT.

As a result of the examination by the Alien Property Custodian of the Botany report, additional information from the New York company was demanded by him and a conference was held in Washington in regard to the matter (page 130; folio 257).

Shortly after the demand of the Alien Property Custodian for additional information, Herbert A. Heyn, of the firm of Heyn and Covington, counsel for the Botany and the New York company (page 122; folio 237), and Nicholas F. Lenssen another lawyer, who was associated with Heyn, went to Washington, to explain matters (testimony page 130; folios 257-258). There were present at the conferences Heyn and Lenssen, Judge Brodhead and Mr. Duvall. Judge Brodhead requested Heyn and Lenssen to make a written statement of what they had told Judge Brodhead orally at those conferences, and Heyn and Lenssen undertook to do so (testimony page 130; folio 257). The letter of Heyn, dated February 9, 1918 (defendants' exhibit F, pages 218-223; folios 417-423), was received by the Alien Property Custodian on February 10, 1918 (page 223; folio 423).

The letter was entitled:

"Botany Worsted Mills,
Stoechr & Sons Inc."

It described the Botany, stated its capital stock, summarized its by-laws, explained the number and personnel of its directors, the unusual nature of the directorship, pointed out the two vacancies on the board, gave the date of the annual meeting of the company, and *other record details*, and then, turning to the New York company, gave the date of its incorporation, submitted a copy of the certificate of incorporation and the by-laws of the company, stated the amount of its capital stock, its officers and directors, and then followed a statement with respect to "Stoehr & Company, the Leipzig Corporation."

It gave certain *record details* as to the "stock control of the Botany Worsted Mills", and then stated:

"Regarding the contract for the purchase of said 14,900 shares of Stoehr & Sons Inc., from Stoehr & Co., of Leipzig, Germany, IT HAS BEEN FULLY EXPLAINED that the CONTROL OF BOTANY MIGHT BE IMPERILED BY A STATE OF WAR, because the voting right on stock of alien enemies or in which alien enemies had the beneficial interest (as was the case with said 14,900 shares) was doubtful under the decisions of the courts, and if deprived of THE VOTING RIGHT, THE CONTROL OF BOTANY MIGHT BE LOST. This contract was made with REFERENCE TO THE CONTROL OF BOTANY AS BETWEEN ITS STOCKHOLDERS AND HAD OF COURSE NO REFERENCE TO THE STATUS OF SUCH CONTROL SO FAR AS THE ALIEN PROPERTY CUSTODIAN IS CONCERNED. Such status is not affected whether such shares are in Stoehr & Co. the Leipzig corporation or in Stoehr & Sons Inc. the New York corporation. AS WE ALSO STATED VERBALLY THERE HAVE BEEN NO RESOLUTIONS OR OTHER CORPORATE ACTION BY STOEHR & CO., THE LEIPZIG CORPORATION, IN CONFIRMATION OF THIS TRANSACTION" (Heyn and Covington's letter of February 9, 1918, defendant's exhibit F, page 222; folios 421-422).

The letter concluded with the following statement:

"To summarize: While Botany is managed in this country, CONSIDERABLY MORE THAN A MAJORITY OF ITS

STOCK IS CONTROLLED BY ALIEN ENEMY INTERESTS WITHIN THE MEANING OF THE ALIEN ENEMY ACT; THE TOTAL OF THE STOCK THUS CONTROLLED (DIRECTLY ANY INDIRECTLY) BEING 30,080 SHARES" (pages 222-223; folio 422).

The letter of Heyn and Covington, with *the formal approval* by Hans E. Stoehr, which will be referred to presently and which was *separately offered* and received in evidence as defendants' exhibit G (pages 223-224; folio 424) is printed in full in the appendix to this brief.

Heyn and Lenssen were in Washington in the early days of February 1918 in conference with the Alien Property Custodian. Hans E. Stoehr on February 5, 1918 wrote from Passaic to Heyn, at the Hotel Raleigh, in Washington, a detailed letter regarding the stock ownership of the Botany and enclosed a list of eight papers and documents mailed to Heyn under separate cover, by registered mail, special delivery (defendants' exhibit X, pages 244-245; folios 447-448). Hans E. Stoehr also sent to Heyn, at the Hotel Raleigh in Washington, a further letter, dated February 5, 1918, from the Fifth Avenue office of the New York company (defendants' exhibit H, page 224; folio 425). It appears from Hans E. Stoehr's first letter of February 5, 1918 to Heyn that Heyn and he had been communicating over the telephone and that Heyn had been reporting to Hans E. Stoehr about his interviews with the Alien Property Custodian. At the conclusion of the conferences in Washington, Heyn and Lenssen agreed to put in writing in summary form "the various facts and statements made by them." By February 9th the detailed statement of Heyn and Covington to the Alien Property Custodian had been prepared in New York.

Heyn knew that as a member of the bar he was playing a dangerous game. He took care to commit Hans E. Stoehr in writing to the approval of his firm's letter to the Alien Property Custodian—a most unusual thing for a lawyer to do. The Heyn and Covington letter of February 9, 1918 was signed by Heyn personally (page 126; folio 243). Before the letter thus signed was sent to the Alien Property Custodian a carbon copy of it was formally approved by Hans E. Stoehr on behalf of

the Botany and on behalf of the New York company. The carbon copy thus approved, Heyn retained in his office files (page 126; folio 243; page 223; folio 424).

That formal and official approval by Hans E. Stoehr was as follows:

"THE FOREGOING APPROVED.

BOTANY WORSTED MILLS,

By Hans E. Stoehr
Treas.

STOEHR & SONS INC.

By Hans E. Stoehr
Pres."

Those three words of Hans E. Stoehr on the carbon copy of that letter: "THE FOREGOING APPROVED," were more than an "approval", more than a mere admission. THEY WERE A CONFESSION OF THE REAL INTENT OF THE PARTIES TO THE TRANSACTION.

The letter of February 9, 1918, the formal approval of that letter by Hans E. Stoehr both as treasurer of the Botany and as president of the New York company; the letter of Hans E. Stoehr from Passaic on February 5, 1918, with its enclosures, to Heyn in Washington; and the second letter of Hans E. Stoehr of February 5, 1918, to Heyn in Washington—all demonstrate the utter falsity of all of the essential allegations of the bill regarding the true intent of the contract.

They demonstrate that the contract relied on by the complainant DID NOT EXPRESS THE REAL INTENTION OF THE PARTIES AND WAS NOT AN HONEST CONTRACT OF THE NATURE THAT IT PURPORTED TO BE.

In Hans E. Stoehr's first letter to Heyn he thanked Heyn "for the satisfactory message which" Heyn gave him "over the telephone," and stated that he was enclosing another letter containing the information asked for "in regard to the holdings of stock in the Botany Worsted Mills and Stoehr & Sons Inc."

Hans E. Stoehr also wrote: "In addition I give you a list of the stockholders of the Botany Worsted Mills as follows:—

"Stoehr & Co.	14,900	Shares		
Hirsch & Arnold	4,100	"		
*Various German stock- holders	6,400	"		
			25,400	Shares
Stoehr & Sons	5,685	"		
Claimed by Prehn and others	1,205	"		
Various Stockholders in U. S. A.	3,710	"	10,600	"
Total			36,000	Shares

*Including about 1000 shares of Austrian Stockholders."

Hans E. Stoehr accurately referred in that letter to the Leipzig corporation by the name in which it was referred to in the Heyn letter as "Stoehr & Co." A copy of that letter is printed in the appendix to this brief, together with a statement of the enclosures forming part thereof.

Hans E. Stoehr's second letter was:

"Stoehr & Sons, Inc.
200 Fifth Avenue,
New York City.

February 5, 1918.

Herbert A. Heyn, Esq.,
Hotel Raleigh,
Washington, D. C.

Dear Sir:

I herewith wish to state that the majority of the stock of the BOTANY WORSTED MILLS, Passaic, N. J., and of Stoehr & Sons Inc., New York, is HELD BY PARTIES who are 'alien enemies' under the 'Trading with the Enemy Act'.

This information is given by me as Treasurer of the BOTANY WORSTED MILLS, and as President of STOEHR & SONS INC.

Yours very truly,

Hans E. Stoehr".

The two letters of Hans E. Stoehr to Heyn of February 5, 1918, and Heyn's letter of February 9, 1918 to the Alien Property Custodian, and Hans E. Stoehr's approval of that letter of Heyn, should all be considered together. Yet in his labored attempt to explain away Heyn's letter, counsel for the appellant coolly ignores Hans E. Stoehr's two letters to Heyn (appellant's brief, pages 76-81).

The two letters of Hans E. Stoehr were held by Judge Hand to be conclusive evidence of the intention of the parties. Judge Hand said: "Each was probably intended for transmission to the authorities, and each flatly contradicted the contract of February twentieth, 1917, at least unless it was an option, which, as I have shown, is incredible" (page 316; folios 542-543).

Judge Hand then points out that the statements contained in Heyn's letter were "cumulative upon the earlier reports under section 7(a)", and that "This information was given in compliance with section 7(a), the second paragraph of which requires a statement as of February third, 1917, of all enemy shareholders who the corporate officer had cause to suppose then or later owned any share * * * . The section in addition required him to say what shares were enemy owned, though standing in the name of another when the report was filed. He was therefore positively required to state the character of the relations arising under the contract of February twentieth, 1917, and his account of it was authoritative. There can be no question that, had the Leipzig company had only a vendor's lien, it would have been a wrong upon Stoehr & Sons, Inc. to fail to state its full rights. In saying that the 'control' for purposes of the Act was in the Leipzig company, I may fairly suppose that he had in mind those provisions of section 7(a) under which he was

acting; he used 'controlled' as 'owned' " (page 316; folio 543).

Further, Judge Hand, commenting on the fact that Heyn and Hans E. Stoehr were dead, expressly holds that "THE ASPECT WHICH THE PLAINTIFF SEEKS TO PUT UPON THE CONTRACT IS AN APOCRYPHAL AFTERTHOUGHT, WHICH THERE IS NO REASON WHATEVER TO SUPPOSE THAT THEY, WERE THEY ALIVE, WOULD NOW HAVE THE DISPOSITION, OR THE HARDIHOOD, TO ADOPT. Their declarations ANTE LITEM MOTAM fit that interpretation, which alone acquits them at once of any purpose to defraud either their associates or the United States in its rights as captor. I have no question that the beneficial ownership of the Leipzig shares WAS ALWAYS INTENDED TO REMAIN IN THE LEIPZIG COMPANY" (pages 316-317; folios 543-544).

In spite of the decisive effect that Judge Hand gave to the two letters of Hans E. Stoehr to Heyn, counsel for the appellant in his brief in this Court DOES NOT REFER TO EITHER OF THEM. The reason is obvious. The meaning of the two letters cannot be obscured by any sophistical argument. They are short, clear and decisive. Therefore, counsel for the appellant, unable to explain them away, deliberately ignores them and attempts to explain Heyn's letter ALONE as being consistent with the theory of the complaint.

X

THE EFFORTS OF COUNSEL FOR THE APPELLANT TO EXPLAIN AWAY THE HEYN LETTER

The whole effort of counsel for the appellant (pages 78-83) to explain away the plain words of the Heyn letter is devoid of sincerity and candor. It ignores the full, concrete facts. It is a mesh of wire-drawn theories and technicalities. It is a shirking of a lawyer's intellectual duty to the Court. It is an attempt to smother and to bury the truth under pages of irrelevant discussion. It fails

to meet the real points. It has no rational foundation. It is typical of many other parts of his brief in referring only to fragments of the evidence that he claims support the complaint, and nothing more.

Counsel for the appellant states that under *The Trading with the Enemy Act* subsequently passed the interests of the German stockholders in the New York company "could be captured, as in fact they were, to the same extent as their partnership interests might have been captured had there been no incorporation" (appellant's brief, page 78). This is a misleading statement. If the assets of the partnership had not been turned over to the company, the capture of the interests of the German partners in the partnership would have given the Government tangible assets, such as money and securities. But the capture of the alien-owned stock of the New York company brought the Government practically nothing owing to the fact that it was held subject to the voting trust agreement running for five years, which prevented its sale. In fact, the only things captured by the Alien Property Custodian from the New York company were the two voting trust certificates, held for the two aliens. The assignment of the partnership assets to the New York company effectually defeated the Government's right of capture of the partnership assets. The voting trust agreement prevented the sale by the Government of the German owned stock of the New York company.

Again, counsel for the appellant states that the "acquisition" by the New York corporation of the 14,900 shares "was likewise intended to conserve the business of the latter corporation and to avoid the mismanagement or waste that might result were the control and management to fall into the hands of a small minority of stockholders" (pages 78-79). "Conserve the business . . . and avoid mismanagement!" For whose benefit? For the benefit of the stockholders of the Leipzig company? No. But for the benefit of the stockholders of the New York company who were the four Stoehrs. The very contract that was to deprive the Leipzig company of its most valuable asset was to "conserve" that asset—not for the Leipzig

company, but for the New York company and *its* stockholders. If all of the stock of the New York company had been owned by the Leipzig company, there might have been some plausibility in that "conservation" theory.

Again, stating that it was "doubtful whether, in the event of war, the trustees would have been entitled to vote on the stock which they held in trust for the Leipzig company," counsel for the plaintiff states: "For that reason it was believed that a *sale* by the Leipzig company to the New York company, *which was under the control of* Hans E. Stoehr and Max W. Stoehr, would prevent the dismemberment and possible destruction of the Botany Worsted Mills" (page 79). If that has any meaning, it is merely corroborative of the statement in the Heyn letter that "this contract was made with reference to the control of Botany as between its stockholders and had of course no reference to the status of such control so far as the Alien Property Custodian is concerned". That negatives the idea of an intention to sell and part with the beneficial ownership.

It puts the only possible interpretation upon the acts of the parties and upon the declarations of Heyn that relieves them of the imputation of fraud. The fact that there was *no intention* to transfer the beneficial ownership is shown by the next sentence in Heyn's letter: "Such *status* is not affected whether such shares are in Stoehr & Co., the Leipzig corporation, or in Stoehr & Sons, Inc., the New York corporation. As we have also stated verbally, there have been no resolutions or other corporate action by Stoehr & Co., the Leipzig corporation, in confirmation of this transaction." Counsel for the appellant argues that Heyn did not use the word "controlled" in the sense of "owned" (page 82). He seeks to justify that interpretation by arguing that "the *controlling interest* in the stock of the New York company was in German enemies." The whole context of the Heyn letter shows that Heyn referred to beneficial ownership. The Government so understood his letter. Hans E. Stoehr's two letters put the question beyond argument.

Again, counsel for the plaintiff states: "In the event of war and the subsequent enactment of *The Trading with the Enemy Act*, such a transfer would in no wise have interfered with the exercise of the war powers of our Government, the *interests of the German stockholders* in the New York company could have been captured, and any amount owing by the New York company to the Leipzig company could likewise have been captured" (page 79). That statement ignores two vital facts: first, the "interests of the German stockholders in the New York company" could *not* have been *effectually* captured. The only capture that the United States could and did make was of the two voting trust certificates representing the enemy-owned stock. Secondly, "Any amount owing by the New York company to the Leipzig company" could *not* "likewise have been captured", because (a) there was no obligation upon the New York company to make *any* payment until the end of a year and sixty days, and then only upon the delivery of certificates representing one-fifth of the shares, which was impossible; (b) the New York company had no funds or money belonging to the Leipzig company which the Government could seize and use in the conduct of the war; and (c) though the Government did, expressly subject to its prior seizure of the 14,900 shares, demand the rights of the Leipzig company in the contract (page 271; folios 478-479), under that seizure the Alien Property Custodian has in fact received not a penny, for no money was due or made payable under the contract or could be collected under the contract by the Government. The pretense, therefore, that the scheme would or could not hamper the Government in its seizure of alien money and property in the United States, is reduced to an absurdity.

In one breath counsel for the appellant states that Heyn "expressed himself with such clarity" (page 82), and that the motives that prompted the organization of the New York company and the transfer to it of the shares "were stated with entire accuracy" (page 82). But two pages before that he stated that Heyn's letter "was writ-

ten at a period of great stress" and that he "was naturally anxious to exonerate himself and his clients from any imputation that he or they were seeking to circumvent and defeat the right of the Alien Property Custodian to seize enemy property" (page 80). He then states that the Heyn letter "in every way sustains our contention that the transfer was not colorable".

He further states that to say that Heyn "used the word 'controlled' in the sense of the word 'owned' is without justification" (page 82).

Heyn referred to two things in his letter: first, voting control, and secondly beneficial ownership. He said: "The control of Botany might be imperilled by a state of war, because the voting right on stock of alien enemies or in which alien enemies had the beneficial interest (as was the case with said 14,900 shares) was doubtful under the decisions of the Courts, and if deprived of the voting right the control of Botany might be lost." There Heyn used the word "control" in the sense of "voting control" and not in the sense of beneficial interest or ownership. He then said: "This contract was made with reference to the control of Botany as between its stockholders". There again he used the word "control" in the sense of voting control. Then he passed to the question of ownership or beneficial interest, and said: "and had of course no reference to the *status* of such control as far as the Alien Property Custodian is concerned." That sentence referred and could, considered in connection with the context, only refer to beneficial ownership, and to nothing else. That conclusion is made inevitable by the very next sentence: "Such *status* is not affected whether such shares are in Stoehr & Co., the Leipzig corporation, or in Stoehr & Sons, Inc., the New York corporation." To say that the word "*status*" in that sentence meant voting control and not beneficial ownership, is absurd. The Alien Property Custodian was not interested in mere voting control but in *title, ownership and property*. That the word "*status*" as used by Heyn was meant to refer to beneficial ownership is again shown by the next sentence in

his letter: "As we have also stated verbally there have been no resolutions or other corporate action by Stoeck & Co., the Leipzig corporation, in confirmation of this transaction."

Finally, the matter is put beyond argument by the summary at the end of Heyn's letter: "While Botany is managed in this country, considerably more than a majority of its stock is controlled by alien enemy interests within the meaning of the Alien Enemy Act." If the word "controlled" in that sentence be held to mean merely voting control, then the statement was false, for the majority of the stock of the Botany, to wit, the 14,900 shares and the 5,690 shares (stated by Heyn as 5,685 shares), was not "controlled by alien enemy interests within the meaning of the Alien Enemy Act", but by the New York corporation which was of course not an alien enemy and was entitled to vote the 20,590 shares.

If the beneficial ownership in the 14,900 shares had passed to the New York company, then Heyn's statement that "more than a majority of its stock is controlled by alien enemy interests" would be false.

Heyn's statement can be justified only by the construction of the word "controlled" to mean beneficially owned. And that is the sense in which Judge Hand construed Heyn's letter.

When Hans E. Stoeck in his first letter to Heyn said: "In addition I give you a list of the stockholders of the Botany Worsted Mills as follows", he meant stockholders in the beneficial sense and not holders of record for purposes of voting control.

In his second letter to Heyn he said: "I herewith wish to state that the majority of the stock of the Botany Worsted Mills, Passaic, N. J., and of Stoeck & Sons, Inc., New York, is held by parties who are 'alien enemies' under the 'Trading with the Enemy Act'." When Hans E. Stoeck referred to the stock of the New York company as being "held by parties who are 'alien enemies'", he obviously meant beneficially owned. If he meant only "held for voting control", his statement would be false, for it was not "held for voting control" by "parties who

are alien enemies", but by the New York company, which was a stockholder of record of 20,590 shares on the books of the Botany and as such stockholder of record entitled to vote and was not an alien enemy.

Both of Hans E. Stoehr's letters are utterly destructive of the contention that the beneficial ownership in the 14,900 shares was in the New York company. If he had meant that the beneficial ownership of the shares was in the New York company, he would not have written of control at all, for the control would have followed as an incident of the beneficial ownership.

So if Heyn in his statement: "The status of such control so far as the Alien Property Custodian is concerned," and "Such status is not affected," and "More than a majority of the stock is controlled by alien enemies," had not referred to beneficial ownership, they would have been meaningless.

It was only by the beneficial ownership being in aliens that the Alien Property Custodian would have had any right to capture the shares.

Counsel for the appellant further writes: "Looking at the subject from the standpoint of the Alien Property Custodian, he (Heyn) pointed out that the controlling interest in the stock of the New York company was in German enemies and that their interests could be captured by the Government if it so desired, and through such capture not only could the New York company, but the Botany Worsted Mills, be controlled by the Alien Property Custodian" (pages 82-83).

Heyn did not "point out" that the "controlling interest in the stock of the New York company" of the "German enemies" could be "captured by the Government if it so desired", and in fact the only "interest" of the German enemies in the New York company that the Alien Property Custodian could and did effectually capture was the two voting trust certificates, which could not be sold.

Heyn could not and did not "point out" that through the capture of "the controlling interest in the stock of the New York company held by German enemies"

the Botany could be "controlled by the Alien Property Custodian," because that would have been false. On the theory that the contract vested the beneficial interest in the New York company, the voting control would be and remain, not in the Alien Property Custodian, but in the voting trustees of the New York company. Besides, "control by the Alien Property Custodian" was not the vital object of *The Trading with the Enemy Act*, but the capture of enemy property and its sale for the benefit of or its use by the Government of the United States in the conduct of the war.

But the crowning absurdity in the argument of counsel for the appellant is this: "Far from interfering with the belligerent rights of our Government, they were subverted by what had been lawfully done before the declaration of war" (page 83). If that sentence means anything, it means that the beneficial ownership vested in the New York company, and that hence the only things that the Government could seize were the two voting trust certificates held for the two aliens, which could not be converted into money, which could not be used by the Government in the prosecution of the war, and which would not enable the Government to control either the New York company or the Botany company.

Thus it is, to quote the language of counsel for the appellant, that "far from interfering with the belligerent rights of our Government, they were subverted by what had been lawfully done before the declaration of war"! The brazenness of those "arguments" is obvious. They are worse than pedantic. They suppress the truth. They pervert the facts.

Heyn was the counsel for the Botany and for the New York company. He had advised Hans E. Stoeck and his associates in connection with the incorporation of the New York company. He had prepared the certificate of incorporation of the company. He had advised with reference to its organization (testimony of Max W. Stoeck, page 112; folio 216). He had prepared the minutes of the stockholders' and directors' meetings, the voting trust agree-

ment and had advised the New York company with reference to the issuance of the stock for the partnership assets (testimony, page 112; folio 216; pages 121-122; folios 236-237) and had prepared the agreement of February 20, 1917. His letter was therefore an admission by counsel of the company, who was the engineer of the whole scheme, as to the intention of the persons concerned in the attempt to save from capture the \$6,000,000 asset of the Leipzig corporation by means of the sham contract with the New York company.

Heyn added that the contract "had of course no reference to the STATUS OF SUCH CONTROL so far as the Alien Property Custodian is concerned" (page 222; folio 422). But if the contract was what it purported to be, and the intention of the parties was what the contract attempted to show their intention to be, the contract would have had a most decided effect upon "*the control of the Botany as far as the Alien Property Custodian was concerned*".

If the contract was what it purported to be on its face, the control of the Botany would be in the New York corporation, and the Alien Property Custodian would have no direct control whatever over the Botany.

Heyn as a member of the bar doubtless felt that he dare not in his letter of February 9, 1918, admit or confess that *the whole contract was a sham*—that the New York parties to it did not mean what upon its face it said. To have admitted that the whole thing was a sham, as it undoubtedly was, would have been an admission by him as a member of the bar that he had advised and engineered a scheme for the purpose of defeating a law or laws of the United States that was or were certain to be enacted upon the outbreak of war. So he made statements of *the record* facts accurately, and made an explanation of the contract that was essentially a confession *that the whole contract was a sham* but that saved his face by reading into it an intention limiting it only *to voting control*.

But he did more than that. He was daring to the last. For his letter adroitly *concealed* any *specific reference* to the voting trust agreement and *concealed* the fact that it

was a *five-year voting trust* agreement and that the three voting trustees were the two Stoehrs and Roehlig.

Heyn's letter must be taken to mean that, contrary to what the contract purported to be on its face, the real intention was to preserve the beneficial ownership of the stock for the Leipzig corporation, an alien enemy of the United States.

Heyn, the member of that firm who was the engineer of the scheme, is dead.

It is not conceivable that he would have dared to appear in this Court and have the audacity to assert that the contract transferred, and was intended to transfer, *honestly and without reservation* the beneficial ownership of the shares from the Leipzig corporation to the New York corporation, and that *Hans E. Stoechr had authority to act for the Leipzig corporation.*

If Heyn, with his knowledge of the facts and in spite of his admissions and written statements, had advised the complainant to do what the complainant has done in this case, if under Heyn's advice the complainant had sworn to the bill and testified as the complainant has in this case, Heyn would have been guilty of the grossest kind of professional misconduct. Had he been mad enough to do such a thing, he would have laid himself open not merely to disbarment proceedings but would have been guilty of subornation of perjury and of conspiracy.

Hans E. Stoechr, who was one of the two chief actors in the transaction under the guidance of Heyn, is also dead. It is likewise inconceivable that Hans E. Stoechr, had he lived, would have dared to go on the stand and testify in the way that Max W. Stoechr attempted to swear this case through as to the *implied* authority of Hans E. Stoechr, or that Hans E. Stoechr would have dared to swear to a bill the very essence of which was that the contract of February 20, 1917 was an honest and *bona fide* contract. Had Hans E. Stoechr lived, and had he sworn to such a bill, he would have been clearly, under his letters to Heyn, indictable for perjury. *Manet litera scripta!*

Though Heyn and Hans E. Stoehr have gone, their words, their declarations, their admissions, their confessions, remain, and the contrast between those written words and the brazen testimony of Max W. Stoehr is too glaring to call for further comment.

THE REAL MOTIVE OF THE LETTERS

Up to this point we have considered the Heyn letter and its interpretation by counsel for the plaintiff without regard to the facts leading up to it and the motives that impelled the writing of it. TWO CRUCIAL PERIODS OF TIME ARE INVOLVED HERE. The first is February, 1917, when the contract was made and the elaborate *paper* scheme carried out to bury the German interests in the New York company beyond the reach of effective capture. The next crucial period is February, 1918.

In the meantime *The Trading with the Enemy Act* had been passed. That Act required the Stoehrs to make reports of all the alien interests of all and every kind and nature held by them or by corporations of which they were officers. MAX W. STOEHR SWORE TO THREE REPORTS TO THE ALIEN PROPERTY CUSTODIAN:

(1) The report of the New York corporation which was sworn to December 6, 1917.

(2) The report sworn to December 3, 1917 of the interests owned by Eduard Stoehr.

(3) The report sworn to December 3, 1917 of the interests of the alien enemy Georg Stoehr.

Max W. Stoehr SUPPRESSED MATERIAL FACTS IN THOSE REPORTS and LAID HIMSELF OPEN TO PROSECUTION UNDER THE PROVISIONS OF THE ACT.

None of those reports contained *any reference to the contract.*

Those reports reveal a deliberate intention on the part of Max W. Stoehr to deceive the Government. But the truth came out—not from Max W. Stoehr or from

Hans E. Stoehr or from Heyn—but from a report made by Prehn, the president of the Botany, in which Prehn made a statement regarding the 14,900 shares and the fact that the Botany “had reason to believe that Stoehr & Company, a corporation of Leipzig, had an interest under contract” in those shares. THAT STATEMENT OF PREHN STARTED THE INVESTIGATION IN WASHINGTON. It led to the inquiry for facts, and then Heyn and Hans E. Stoehr and Max W. Stoehr realized where they were and that Max W. Stoehr WAS IN DANGER OF PROSECUTION UNDER THE ACT.

No change of heart had come over these two Germans or Heyn between February 1917 and February 1918. When, in December 1918, Max W. Stoehr swore to those three reports, he had the same intention that he had in February, 1917. But when the three—the two Stoehrs and Heyn—realized that the facts must come out, then they wanted to confess, they were eager to confess, not because of a change of heart, but because by a confession they might save Max W. Stoehr from prosecution.

Because Max W. Stoehr had suppressed material facts, his brother Hans E. Stoehr was put forward to explain things, through Heyn and Lenssen, to the Alien Property Custodian. Max W. Stoehr was then kept in the background. Hence Hans E. Stoehr's anxiety while Heyn was in Washington. Hans E. Stoehr thanks Heyn “for the SATISFACTORY MESSAGE which you gave me *over the telephone* reporting about your interview at the Department of the Alien Property Custodian”.

An analysis of Max W. Stoehr's three reports and of the separate report of the Botany by its president Prehn, is contained in the appendix to this brief for convenience of reference.

That Heyn's attempt thus to explain the contract was misleading, is demonstrated by the fact that as part of the same transaction all of the stock of the New York company, which company on the stock books of the Botany became the record holder of 20,585 shares (defendants' exhibit Y, pages 245-248; folios 449-450) was placed under a voting trust agreement to run for a period of five years (plain-

tiff's exhibit 5; pages 197-199; folios 365-370). Heyn did not explain how such a voting trust agreement was necessary "in reference to the control of Botany as between its stockholders". He asserted that the contract "had of course no reference to the status of such control so far as the Alien Property Custodian is concerned".

BUT HE CAREFULLY CONCEALED THE FACT that the stock of the New York company was under a five-year voting trust. In connection with his "explanation" of the capital stock of Stoehr & Sons, Inc. he wrote, referring to the partnership of Stoehr & Sons:

"It was assumed that if there was a declaration of war between the United States and Germany, the partnership would probably have to cease, being dissolved by reason of the alien-enemy character of Eduard Stoehr, the father, and Geo. Stoehr, the brother, the results of such dissolution being of course obviously *unfortunate and conceivably disastrous*".

And then he wrote:

"The partners retained the same proportional interest in the corporation as their interest in the partnership, namely, Eduard Stoehr, the father, 1875 shares, Geo. Stoehr, the brother, 222.21 shares (*being represented by trust certificates* held by M. W. Stoehr for his father and brother)—in other words somewhat more than 4/5ths interest in parties resident in Germany".

Obviously the reference by Heyn in his letter to "trust certificates" was put in to save himself from the charge of a suppression of material facts and to tuck away in the letter an obscure self-justifying phrase, if he should ever be called upon to explain the existence of the five-year voting trust agreement.

The Law

A government at war may confiscate in accordance with its own laws and rules of procedure any property belonging to an enemy alien found within its territory. The only

question is whether such property belongs to an enemy alien. In determining the ownership of such property the seizing government is not limited in its rights by the apparent ownership of the property, but determines the actual ownership. If the *beneficial ownership*, open or secret, of property is actually in an alien enemy, the government may seize the property as enemy alien property *whatever the apparent ownership and whatever the legal title*. The authorities for these propositions need not be quoted to this Court.

That principle of law is the basis of *The Trading with the Enemy Act*, and is assumed by that Act's existence. The Act itself, Section 7, subdivision (c) reads as follows:

"(c) If the President shall so require, any money or other property *owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of*, an enemy or ally of enemy not holding a license granted by the President hereunder, *which the President after investigation shall determine is so owing, or so belongs, or is so held*, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian."

This suit is brought under Section 9 of the Act, and in it must be determined who is the *real owner* of the 14,900 shares. The rules for determining that ownership, in the case of property alleged to be enemy-alien owned, do not differ in substance from the rules which guide Courts in determining whether ANY OTHER TRANSACTION IS OR IS NOT IN FACT WHAT IT PURPORTS TO BE.

Those rules involve a consideration not only of the transaction itself but of all the surrounding facts, including in the case of conveyances or contracts in contemplation of war or in contemplation of bankruptcy, the connection in point of time and other circumstances between the particular contract or transaction and the act of war or bankruptcy, as the case may be.

The Courts invariably look beyond the form of the transaction to its substance. They are not limited by

mere technicalities such as whether or not the legal title was transferred and whether or not to hold the beneficial ownership in one person would necessitate contradicting the terms of a written instrument. The essential, almost the controlling, question which the Courts ask in determining whether a transfer of property is a real transfer of beneficial ownership of the character which it purports to be or is merely a colorable transfer for an ulterior purpose, not expressly stated, is WHETHER THE TRANSACTION IS OF SUCH A CHARACTER AS TWO PARTIES BEARING THE RELATION TO EACH OTHER THAT THE PARTIES TO A CONTRACT ACTUALLY DO BEAR, WOULD MAKE, IF THERE WERE NO SUCH ULTERIOR PURPOSE.

That is the real test. All rules as to particular parts of a transaction which must be especially examined are merely illustrations of the application of that general principle. Among such subsidiary well-known rules are the following:

- (1) The known inability of the purchaser to pay for his purchase.
- (2) Continuation of the seller's interest in the property.
- (3) Retention by the seller of any control over the property.
- (4) Unusual haste.
- (5) Unusual length of credit.
- (6) Excessive effort at regularity.
- (7) Extraordinary insufficiency of the consideration, or obvious inequality of the contract with respect to its benefits and burdens.

There must always be taken into consideration the motives which the parties might have and the possible benefits which they might obtain from making the purported transaction different from the reality; that is to say, benefits that would be derived by either party from concealment of the true purpose.

There are many authorities and many decided cases, *especially in equity*, in which the true nature, purpose

or object of the transaction has been shown, even though such evidence may apparently contradict the writing, as to the consideration, object or purpose thereof. Courts have repeatedly admitted evidence that notwithstanding formal writings, declarations, resolutions or testamentary papers there was never any contract, agreement, corporate action or testamentary disposition at all. We have referred to a few of the decisions and authorities in support of this fundamental principle in the appendix, and have included among them a digest and consideration of the case of *Fleming v. Morrison*, 187 Mass. 129 (1904), which is very much in point in the case at bar. That case involved a will witnessed by two persons when the fact was that the nominal testator had told one of the witnesses that he was making the will in order to induce the beneficiary to let him sleep with her. The Court held that what had been done in the making and witnessing of the will was a sham and that there never was any will or testamentary intent at all.

Many of the rules relating to fraudulent conveyances are applicable to the case at bar.

In 20 *Cyc*, page 439, under the title "Badges of Fraud", a number of circumstances which are *indicia* of fraud are set forth as follows:

"There are circumstances so frequently attending conveyances and transfers intended to hinder, delay and defraud creditors that they are denominated badges of fraud. These badges of fraud do not in themselves or *per se* constitute fraud, but are rather signs or *indicia* from which its existence may be properly inferred as matter of evidence. They are more or less strong or weak according to their nature and the number concurring in the same case. They are as infinite in number and form as are the resources and versatility of human artifice.

• • •

"The fact that the consideration of a conveyance is fictitious in whole or in part is evidence of fraud. • • •

"Inadequacy of consideration is a fact calling for explanation, and therefore a badge of fraud, especially when such inadequacy is gross. * * *

*"If a transfer is made by a debtor in anticipation of a suit against him, or after a suit has been begun and while it is pending against him, this is a badge of fraud; but the pendency of a suit will not overturn a conveyance made in good faith and for value. If a conveyance is made pending a suit against the grantor, for the purpose of preventing the collection of such a judgment as may be recovered, and with knowledge of the grantee that it is so made, it will be set aside at the instance of the plaintiff in such suit after judgment for him therein, whether made with or without a valuable consideration. A transfer pending an action of tort against the grantor with intention to defeat the collection of any judgment that may be recovered in such action, is fraudulent, even though such transfer is made for a valuable consideration, if the grantee had knowledge of, or participated in this purpose. It is a badge of fraud that a conveyance was made after the rendition of a verdict in favor of a creditor and while a stay of proceedings was in force. * * **

*"The giving of an absolute conveyance which is intended to operate only as security is held to be a badge of fraud, and some of the cases hold such a conveyance conclusively fraudulent as to existing creditors. * * **

*"Secrecy is a badge of fraud; and so is undue or unusual haste a badge of fraud. Secrecy is a circumstance which may give force to other evidence and from which in connection with other facts fraud may be inferred. * * **

"The mere fact that a sale is made upon credit does not require that the transaction should be declared invalid; but a sale upon credit of part of his property by an insolvent debtor is a circumstance which may be considered with others as bearing upon the question of fraudulent intent; and an un-

*usual length of credit is a badge of fraud. So, too, the giving of long credit to an irresponsible purchaser without security has been considered to be a badge of fraud. * * **

*"Circumstances indicating excessive effort to give the transaction the appearance of fairness or regularity, which are not usually found in such transactions, are to be regarded as badges of fraud. * * **

*"The unexplained retention by the grantor of the possession of the property transferred is a badge of fraud. * * **

*"The reservation of a trust or benefit for the grantor is generally a badge of fraud. * * **

"Badges of fraud are repelled by showing that a full consideration was paid for the property, but the proof of fairness would be more stringent than if such badges of fraud did not exist. Where numerous signs or badges of fraud exist, it is incumbent on the party seeking to uphold the transfer to meet and overcome them."

Among the cases cited in *Cyc* are the following:

Baldwin vs Short, 125 N. Y., 553: An action was brought by an assignee for the benefit of creditors of a firm to set aside a deed executed by one of the defendants, a member of the firm, to another defendant, as fraudulent and void as against creditors. The conveyance was not voluntary, but was made in part in consideration of a debt which was justly due to the grantor from the grantee. The conclusion of a fraudulent intent on the part of the grantee was therefore essential to recovery and it was established by proof that the balance of the consideration for the transfer was made up of a false and pretended debt. It was held:

(1) That when a deed is fraudulent against creditors, it is wholly void; although a portion of the consideration expressed was in fact paid by the grantor, it cannot stand as security or indemnity for that portion.

(2) That when, however, the fact of such payment appears, it is necessary, to sustain an action to set aside the deed, to prove a fraudulent intent on the part of both the grantor and the grantee.

(3) That evidence of conveyances by the grantor to other persons than the grantee prior to the one in question is competent as bearing upon the intent of the grantor; and they may not be excluded because they do not bear upon the intent of the grantee.

In *First National Bank vs Miller*, 163 N. Y., 164, a judgment creditor's action was brought to set aside a conveyance by one of the defendants to his daughter of certain real estate and also a bill of sale of certain personal property made between the same parties. The transfer was made by the father, while he was insolvent, to his daughter who resided with him and who was a member of his family. The value of the property transferred exceeded \$45,000, while the consideration, with the exception of a small amount of a trust indebtedness due from him to her, did not exceed \$38,000, of which \$1,000 was not a valid obligation. By the transfers the father stripped himself of all his property, which fact was known by his daughter, and they were made about a month before the maturity of a note for a large amount of money made by him, and there was no change of possession of the personal property transferred. It was held that the transfers were made by the father with intention to hinder, delay and defraud his creditors.

In *Fuller vs Brown*, 76 Hun, 557, it was held that while the want of a valuable consideration was not alone sufficient to sustain a charge of fraudulent intent in the transfer of property, it was an important fact in that direction that the transfer embraced substantially all the property of the debtor, and left him without means to pay what he owed, and in such a case his voluntary conveyance was controlling evidence of fraud against his then existing creditors.

In *Young vs Heermans*, 66 N. Y., 374, an action was brought by the plaintiff as judgment creditor to vacate

and set aside certain conveyances or deeds of trust made by one Fellows to one of the defendants, as fraudulent and void against creditors. It appeared that the transfer was made by the debtor of all the property, real and personal, without consideration and in trust for him and for his benefit during his life, and after his death for the payment of his debts. It was held that that was *per se* conclusive evidence of fraud as to existing creditors, and that no extrinsic circumstances or evidence *aliunde* was necessary to establish a fraudulent intent.

Among the elements to be taken into consideration in determining whether or not a transaction which purports to be a sale is a real transfer of interest from the seller to the buyer, or only a pretended one, the cases lay down as of primary importance the question whether the seller still retains any substantial control over the property purported to be sold. The opinion of the Court in one early English case went so far as to lay down the rule that the retention in the seller's trade of the property to be sold raises a presumption that the transfer is merely a covered and pretended transfer "so strong that scarcely any proof can avail against it". That case was

1801, *The Jemmy*, 4 C. Rob. 31, *op.* Sir W. Scott,

which was of a ship asserted to have been purchased of the enemy by a neutral. The Court gave judgment condemning the vessel. The opinion of the Court reads in part as follows:

"This case has been admitted to farther proof owing entirely to the suppression of a circumstance, which, if the Court had known, it would not have permitted farther proof to have been introduced; namely, that the ship has been left in the trade, and under the management of the former owner. Whenever that fact appears, the Court will hold it to be conclusive, because, from the *evidentia rei*, the strongest presumption necessarily arises, that it is merely a covered and pretended transfer. The presumption is so strong, that scarcely any proof can

avail against it. It is a rule which the Court finds itself under the absolute necessity of maintaining. If the enemy could be permitted to make a transfer of the ship and yet retain the management of it, as a neutral vessel, it would be impossible for the Court to protect itself against frauds.

"The positive objections which have been pointed out, on the fact of transfer, are also of considerable weight: the inadequacy of the price, *and the chasms appearing in the correspondence, are circumstances inconsistent with the probability of ownership*; there is also the course of trade, which has been entirely French, without interruption, excepting in one voyage to Barcelona; but even in that instance, the vessel returned again to a French port."

In the light of the principles laid down in *The Jenny* case, let us consider the following facts: Prior to February 20, 1917, while the Leipzig corporation was the actual owner of the 14,900 shares which the contract purported to transfer to the New York company, the holders of the legal title were the brothers Stoechr, resident in New York City, or Passaic, New Jersey. They held the stock as trustees. Hans Stoechr was a native German, unnaturalized. Max Stoechr was a native German but naturalized. Their father, Eduard Stoechr, and their brother, Georg Stoechr, were both native Germans, resident in Germany on February 20, 1917 and subsequently. Hans E. Stoechr and Max W. Stoechr were therefore deemed sufficiently trustworthy and capable to have entrusted to them by the Leipzig corporation the voting power upon that stock.

At the annual stockholders' meeting of the Botany held in March, 1916, the 14,900 shares of Botany were voted as follows: by Hans E. Stoechr, "trustee, voted in person", 10,000 shares, and by Max W. Stoechr "trustee, voted in persona," 4,900 shares (defendants' exhibit Y, pages 245-248; folios 449-450).

At the next annual meeting of Botany stockholders held in March, 1917, after the purported transfer, the same shares were represented, and "Stoechr & Sons, Inc. voted

in person 20,585" (defendants' exhibit Y), by Hans E. Stoeck and Max W. Stoeck, who were the officers entitled to represent Stoeck & Sons, Inc. in person.

And at the annual meeting of March 18, 1918, "Max W. Stoeck as proxy for Stoeck & Sons, Inc." again represented the 20,585 shares (defendants' exhibit Y).

The transfer therefore of the shares from the Leipzig corporation to the New York company was not, when the actual facts are considered, a transfer of the control of the shares. They still remained after the purported sale to the New York company subject to the direction and control of Hans E. Stoeck and Max W. Stoeck precisely as they had been when they were owned by the Leipzig company but held for the Leipzig company by Hans E. Stoeck and Max W. Stoeck as trustees. When we consider that the terms of the purported contract were such as no two persons dealing at arms length could possibly intelligently make with each other, do not these facts, connected with the fact that the same persons controlled the stock and its disposition after the purported sale as before, necessitate the conclusion, under the principle of *The Jemmy case*, that the transfer was not a real one but, as stated in the opinion of Sir W. Scott, "*merely a covered and pretended transfer?*"

To the same effect is

1805, The Omnibus, 6 C. Rob. 71, op. Sir W. Scott,

which was against a ship claimed to be the property of a neutral but apparently by the evidence British property trading with the enemy. The Court gave judgment condemning the ship as guilty of trading with the enemy. The opinion reads in part as follows:

"The Court has often had occasion to observe, that where a ship, asserted to have been transferred, is continued under the former agency and in the former habits of trade, *not all the securing in the world will convince it that it is a genuine transaction*. The present case has none of the marks of a real transfer upon it".

An instructive case on this general subject is

1799, The Heydt Gedacht, 2 C. Rob. 137,

which was the case of a small Dutch fishing vessel transferred to a neutral claimant under a condition to reconvey it at the end of the war. The opinion reads in part as follows:

“A sale made by an enemy to neutrals in time of war, must be *an absolute unconditional sale*: This transfer is evidently done in order to cover the property during the war. The vessel continues in the old trade, and is in every respect a Dutch vessel”.

The contract in the case at bar imposed upon the buyer *no obligation* to “re-transfer” the shares to the seller at the close of the war, but the conditions of the contract are such that if the buyer were friendly to the seller and wished merely to hold the property during the continuance of the war and legally re-transfer it to the seller when the war should be over, he could readily do so under the terms of the contract, and the seller of course would gladly welcome the re-transfer.

The contract was clumsily designed to permit the buyer to act as trustee in fact if not in name for the seller and was intended to enable the seller to take back the property at the close of the war, without any obligation arising on the part of the buyer with respect to paying for the stock, and without the seller being able to hold the buyer legally in any manner whatever, in case the buyer did not wish to consummate the transaction as an actual sale.

The contract was obviously designed to permit the purported buyer to protect the interest of the seller during the continuance of war, *and then enable the seller to take back the property when the war should be over*, without any possibility of the buyer becoming in any way liable for the purchase price of the stock, and with the buyer having the right to receive a large sum of money in cash as dividends on the stock, to be also returned to the Leipzig cor-

poration the same as the stock. While the seller did not nominally retain any control over the voting right in the shares, and while the New York company was vested with the voting rights carrying the control of the Botany and with the right to receive the dividends declared and paid thereon, the buyer by merely declining to pay any of the instalments under the contract would allow the seller to take back the property when the proper time should arrive.

Although the contract provided on its face that in such a case the New York company should not be accountable to the Leipzig corporation for the dividends received by the New York company, it would be preposterous to contend that, considering the relations of the two Stoehrs in this country and of their cousin Roehlig, to the Stoehr family and to the Leipzig corporation, the New York company would not pay back the dividends also. In the light of the facts, that provision of the contract was a mere sham, put into the contract for the purpose of giving it a color of regularity, and the dividends were intended to be held and paid to the Leipzig corporation just as the stock was intended to be re-transferred to the Leipzig corporation, when the danger of capture was over and the war had passed.

Again, that THE INABILITY OF THE BUYER TO PAY THE PURCHASE PRICE is an important fact tending to show lack of good faith in the transfer is laid down in *The Proton*, 87 *Law Journal* (Admiralty 1915) 114. That was a writ of condemnation against *The Proton* as an enemy vessel.

The Proton had been purchased by the appellant Kouremetis April 1915 and duly registered as a Greek vessel. On July 27, 1915 a writ of condemnation was issued against the vessel as a good and lawful prize. One of the questions involved was whether the vessel was really owned by the purported owner, Kouremetis, or whether the real owner was the German government.

The Court held that the real owner was the German government, basing its conclusion largely upon the fact that the purported owner, Kouremetis, although he paid cash for the vessel, was not a person of any financial

responsibility, and that the evidence tended to show that the money must have been furnished him by some other person, which other person in view of his enemy associations the Court held was probably the German government. The appeal was dismissed on the ground that whether or not the German government was the real owner, if the Court were correct in assuming that Kouremetis was not the real owner, Kouremetis had no standing in Court, because only as an actual owner would he have any such standing. The opinion of the Appellate Court reads in part as follows:

"The learned Judge disbelieved the appellants' case and on the evidence found (1) that Michael Kouremetis had no means of his own with which to buy *The Proton*; did not buy her and was not her owner; but only figured as her owner in order that she might continue to fly the Greek flag as a convenient but dishonest device. (2) that in view of his enemy associations he must have bought her with German money; (3) that only the German government could have been concerned in laying out so much money on the ship in order forthwith to hazard her in so dubious and dangerous an adventure; (4) that as Michael Kouremetis was no seaman he would only have been on board to look after the interests of the German government, his employer. If the learned Judge's first finding is right, this appeal fails, for Michael Kouremetis had no character except that of owner in which he could claim to have the ship released to him, and if not her owner has no *locus standi* to criticize or complain of her condemnation".

It is not necessary to repeat here the facts which demonstrate the financial inability of the New York company to carry out a \$6,000,000 stock purchase when it was a concern with comparatively small assets, with scarcely any available banking assets, and with no bank to lend any money to it to consummate the purchase of *shares the cer-*

tificates for which were physically in Germany and could not be received from Germany until after the war.

Again the fact that UNUSUAL HASTE IN A TRANSACTION TENDS TO SHOW THE TRANSACTION A COLORABLE ONE is also well established. For example such was the decision in *Shaungut v. Udall*, 93 Ala. 302, which was an application to set aside a sale of goods as made, to the knowledge of the buyer, with intent to hinder, delay or defraud the seller's creditors. The case really turned on whether the buyer had notice of such intent on the part of the seller. The Court held that the unusual haste of the transaction was a circumstance tending to show that the buyer had such notice. The point of the case really was that a transaction characterized by unusual haste thereby becomes suspicious and will be scrutinized by the Court much more closely than otherwise, and a greater burden arises upon the parties to explain the transaction as one made in good faith.

In the case at bar the extraordinary haste of the parties appears at many points and especially from the fact that the Leipzig corporation's name was affixed to the contract without any previous communication with the Leipzig corporation or any previous authorization. Hans E. Stoehr and Max W. Stoehr were bare trustees of the record title of the shares on the books of the Botany, and were not trustees generally for the Leipzig corporation.

To the same effect upon the question of undue haste is the case of *Bendetson v. Moody*, 100 Michigan 563.

As to when UNUSUAL TERMS OF CREDIT WILL BE HELD TO BE A BADGE OF FRAUD, it has been held that where a contract would be open to legal objection if not in good faith intended to be what it purports to be, the fact that an unusual term of credit was given tends to show that the contract was not made in good faith. This is well established.

A decision to that effect is *Borland v. Walker*, 7 Ala. 269, where an insolvent, with judgment in force against

him and others about to be obtained, sold to his father-in-law his entire estate, reserving his household furniture, and providing by the contract of sale for the payment of only a portion of his debts, giving the buyer a credit for the residue of the purchase money, the first payment of which was to fall due in seven years and the last in twelve. The Court held such a transfer would be presumed to be in fraud of the alleged seller's creditors, unless the suspicious circumstances of the extreme length of credit were satisfactorily explained and the contract shown to be *bona fide*.

In the case at bar no satisfactory explanation whatever appears of the extension of the terms of credit over five years. As shown by the Heyn letter, 1205 shares were bought and paid for in 1916 by stockholders resident in the United States. No reason was shown by the plaintiff why the 14,900 shares could not have been sold for cash. The Court will doubtless take judicial notice of the fact that it is abnormal, to say the least, to give five years' credit on the sale of a majority stock interest in a large corporation.

As a matter of fact a *bona fide* sale of this stock on February 20, 1917 could not only have been made for the then book value of the shares, *in cash*, but that purchase price could then *easily* have been transmitted to the seller in Germany before war actually existed between Germany and the United States. Why then, when the Leipzig company could have made a sale of the stock for substantially the same purchase price, *payable presently in cash*, with immediate delivery to the purchasers, should it give credit extending over five years to a purchaser, who purchased without any obligation to pay for the stock if he should elect not to take it?

Any time during the month of December, 1916, or during January or February or March, 1917, it was perfectly easy to communicate by wireless with Germany, and to receive wireless communications from Germany. (Evidence summarized in appendix.)

It was perfectly easy during all those weeks for the Leipzig corporation to *assign* its interest in the shares to an American purchaser or group of purchasers, to have

sent by wireless notice of such assignment to any purchaser or group of purchasers and *to have sent the physical certificates, duly endorsed* by the Leipzig company, to any one of a hundred bank correspondents of perfectly well-known American banks in either Switzerland, Holland, Denmark, Norway or Sweden.

The Court will recall that Article XVIII of the by-laws then in force provided that the certificates abroad "may be deposited, properly endorsed, with * * * any director resident at Leipzig, who is to *certify* such transfer or assignment to the treasurer at the principal office of the company, and the treasurer shall thereupon note such transfer upon the share book of the company *and advise* * * * such director at Leipzig of the transfer so made."

Two things are to be observed regarding that provision: First, the director in Leipzig was *not* required to "certify such transfer" IN WRITING, and hence he could easily send such a certificate by wireless. Secondly, the treasurer of the Botany company was *not* required to "advise * * * such director at Leipzig of the transfer so made" IN WRITING. Hence the Botany treasurer could at any time during those weeks have sent his "advice" of the transfer on the books of the Botany by wireless to the director in Leipzig.

It is common knowledge that transactions involving many millions of dollars were carried out during those weeks between persons in this country and persons in Germany. Many hundreds of sales of stock were consummated *by wireless* at that time, and other much larger transactions were consummated *by wireless* later during those very weeks. (See evidence summarized in appendix.)

An American purchaser or a group of purchasers of those shares would have paid their money for the shares upon a wireless communication from any American bank's correspondent in any of those adjacent neutral countries to such a purchaser or to his or their bank in this country, with the usual cable test, that such bank had received said shares *endorsed by the Leipzig company* for account of the American purchaser. That would have made the transaction complete.

And finally, it was perfectly possible and legal for any bank in any of those neutral countries to send the physical certificates representing those shares to an American purchaser, even after war was declared between the United States and Germany.

Again, that EXCESSIVE ATTEMPTS AT REGULARITY RENDER SUSPICIOUS A CONTRACT which would be invalid or subject to legal objection if not in good faith, is also well settled.

An illustrative authority to that effect is 1865, *Loeschigk v. Addison*, 19 Abb. Pr. 169, in which the opinion was by McCunn, J. in the New York Superior Court. This was an action to set aside as fraudulent and void certain transfers of property. The Court set aside the transfer, holding that the excessive regularity of the transaction was an element tending to show its bad faith. The opinion was in part as follows (page 180):

"The bill of sale was not truthful. It professed to be a sale as for a cash payment, and recited dollars and cents, so as to give it the color of a business transaction. The precise motive of the prompt removal of the stock to another store is not explained, but it looks very like a precaution to avoid the presumption of fraud, which attaches to a transfer by a debtor in failing circumstances if unaccompanied by a change of possession. *Considering that the transaction was between confidential friends, father and son-in-law*, that Addison Brothers had no longer an existence or need of a store, this prompt change of location, with *the careful notice of the fact in the agreement pledging the choses in action*, is like that overcaution which is one of the settled *indicia* of fraud, which EVINCE A DIFFIDENCE IN THE RECTITUDE OF THE TRANSACTION AND EXCITES A CORRESPONDING SOLICITUDE TO PROVIDE DEFENCES FOR ITS PROTECTION".

Let us apply the principles enunciated in the opinion of Judge McCunn to the case at bar. The contract does not appear on an analysis to be what on its face it purports

to be. It was drawn with seeming care to give the appearance of an actual sale for an actual purchase price. A careful analysis however discloses that the purchase price need never be paid, but that the buyer could at any time default, with only the penalty of losing the right of further ownership of the stock purported to be sold, and forfeiting an initial credit of \$5,000, a mere bookkeeping entry. Against that possible loss was the certain gain to the buyer of at least one year's dividends on the stock amounting to over \$250,000.

There was also in the contract excessive care to provide that the shares purported to be sold should be "forthwith" TRANSFERRED into the name of the New York company. That transfer was provided to be made before any payment other than the initial \$5,000 bookkeeping entry on a purchase price which upon the known condition of the Botany would amount to upwards of \$6,000,000. What possible purpose could there be in making that transfer "forthwith" when not a dollar of the purchase price had been paid; or on the basis of the bookkeeping entry, only one-tenth of one per cent of that enormous purchase price had been paid, EXCEPT TO GET THE LEGAL TITLE TO THE STOCK OUT OF THE NAMES OF TRUSTEES FOR A GERMAN COMPANY? This element of the case is similar to that provision in the *Loeschigk case* of the removal of the property. In each case the parties were really providing for an anticipated attack upon the good faith of the transaction.

This leads to a consideration of the facts in the light of the decisions above cited.

(1) The contract was made in great haste, without any previous communication with the Leipzig corporation, although communication by wireless was perfectly feasible during those months.

(2) The assets of the New York company on February 20, 1917, did not indicate any reasonable prospect that the New York company would be in a position on February 20, 1918 to pay the first instalment. It had almost no cash on hand. Its assets were of a character not easily

liquidatable except at a loss. The Botany stock owned by the New York company was not listed. The certificates representing the 5690 shares were not in this country and hence could not be pledged for money to enable it to pay the purchase price of the 14,900 shares.

(3) The terms of credit were extraordinarily long, without any sufficient reason appearing for such length of credit, provided the transaction were in good faith. The selling price of the stock was over \$300 a share and the stock could have been readily sold for that amount among the persons acquainted with its value. As a matter of fact other sales of Botany stock *for cash* had been made shortly prior to that period (Heyn letter, defendants' exhibit F, pages 218-223; folios 417-423). There is no doubt that the entire amount of Botany stock could have been sold at the price provided for in this contract, but in cash payable immediately. This fact in itself is sufficient to throw doubt on the transaction.

(4) A sale of such a large block of stock, which enabled the vendee to become the majority owner of the entire stock of the company, without any allowance whatever for good will, would have been a palpable fraud upon the Leipzig company. Max W. Stoehr himself admitted the elements that go to make up a valuable good will in such a company, but no testimony was needed to show that a sale of stock in a concern like this on a mere "hard assets" basis, without any allowance whatever for good will, was not such a sale as business men would make unless it was accompanied by some secret intention or understanding or expectation of future action, not disclosed in the contract.

(5) Had the contract not been made the shares would, upon the declaration of war, which was admittedly imminent, and the enactment of *Enemy Trading legislation*, have become seizable by the United States. The transfer of the title to the shares to the New York company, if sustained as a *bona fide* transaction, would place it out of the power of the Government to seize these shares as enemy

owned and the Government would be remitted to a claim for payment in five annual instalments, NOT ONE OF WHICH WOULD EVER BE DECLARED DUE.

There was therefore an actual deprivation to the United States Government of a very substantial part of the beneficial interest in the shares if the transaction were to be sustained, for the government would have the right merely to the *purchase price deferred over a period of five years*, or, as the successor in interest of the seller, the Leipzig company, would have the right to put the New York company in default, and upon such default to retake the shares. NEITHER OF THESE ALTERNATIVES WOULD BE OF ANY BENEFIT OR ADVANTAGE TO THE LEIPZIG COMPANY, *if the contract were what on its face it purported to be*. The only conceivable benefit that there could be to the Leipzig company in or from the contract WOULD BE A BENEFIT COMING FROM A SECRET INTENT IN CONNECTION WITH IT.

(6) On the face of the contract the ownership and control of the Botany would remain in the friendly hands of the directors of the New York company. The relations between the directors of the New York company and the stockholders of the Leipzig company were such as to make it perfectly practicable and simple for them to carry out a secret understanding to hold the shares so transferred and the dividends upon the shares, really in trust for the Leipzig company and to account for them to the Leipzig company when the war should be over.

That would be the natural and probable result of the transaction, even without assuming a secret understanding.

(7) There was no change in the control of the property. Before the sale, the two Stoehrs in New York, as Trustees of the 14,900 shares and as members of the partnership, controlled the Botany. After the sale, the Botany was controlled by the New York company, and the New York company was controlled by those two same Stoehrs.

(8) The contract would have benefited the New York company at the expense of the Leipzig company to the

extent of some \$525,800 in dividends (defendants' exhibit R page 234; folio 439) within about fourteen months, without any *expressed* compensating advantage to the Leipzig company.

We must assume that the benefits and burdens of the contract were intended to be to some extent correlative. Neither party would be presumed to have imposed upon itself a burden without some sort of a compensating benefit, a benefit which might under reasonable circumstances be deemed as of some compensating value.

But the transfer to the New York company of the right to take and to keep over \$500,000 in dividends, without any payment therefor, other than a mere bookkeeping credit of \$5,000, had no expressed or apparent compensating advantage to the Leipzig company.

IT IS A NECESSARY INFERENCE THAT EITHER THERE MUST HAVE BEEN SOME SECRET BENEFIT INTENDED TO THE LEIPZIG COMPANY, NOT EXPRESSED IN THE CONTRACT, OR THAT THE NEW YORK COMPANY WAS NOT INTENDED TO BE THE REAL OWNER OF THE DIVIDENDS WHICH IT SHOULD RECEIVE, BUT WAS INTENDED TO HOLD THEM IN TRUST FOR THE LEIPZIG COMPANY AND TO ACCOUNT FOR THEM TO THE LEIPZIG COMPANY WHEN IT SHOULD BE SAFE TO DO SO.

Of this element in the contract alone, there was no explanation presented by the claimant, compatible with good faith. This fact alone should be enough to determine that the actual beneficial ownership of the stock and the proceeds thereof was intended to remain in the Leipzig company.

The only possible explanation of this part of the transaction, compatible with German good faith upon both sides, however much bad faith toward the United States was involved, would be that the directors of the New York company were acting solely to protect the interests of the Leipzig company, and were acting "as good Germans" to save that large asset for the Leipzig company, even though that act was a colorable one and was designed to defeat the right of capture of enemy property by the government of the United States on the outbreak of the war.

(9) It was not even pretended upon the trial by Max W. Stoehr or his counsel that the transaction was merely taking money from one pile and putting it into another, or that it was a transaction similar to the incorporation of the partnership Stoehr & Sons, whereby for the individual interests of the partners were substituted corresponding interests in the corporation. No such identity of ownership between the New York company and the Leipzig corporation was shown. On the contrary, although all of the Stoehrs owned all of the stock of the New York company, the entire family was not shown to be the holders of even a majority interest in the stock of the Leipzig corporation. Such identity of course would not be presumed. It would have to be affirmatively established. Not only did the claimant not attempt to make any such claim, but the uncontradicted evidence affirmatively disposes of any such identity (testimony of Max W. Stoehr, page 119; folio 233).

(10) No "apparent control" of the stock purported to be transferred was retained by the seller, except the seller was to retain the physical certificates. There was, however, a very similar element in the case, in the undoubted intention of the buyer, upon its certain default, to re-vest in the ostensible seller the record title to the shares, without incurring any loss. That element again, while it did not expressly give to the seller the power of re-taking title upon the seller's own instance, did legally put it within the power of the buyer to re-transfer the title to the seller without the buyer being responsible in damages.

When the community in interest between the directors of the buyer and the large stock owners of the seller is taken into consideration, their blood relationship and long, close business relations, the inference that the purchaser was intended at the proper time to default and allow the seller to re-take the title, is overwhelming.

(11) The entire record demonstrates the haste with which things were done. At that time and for six weeks thereafter it was perfectly possible and even easy to communicate with Germany by wireless and to ask for and

receive the authority or ratification of the Leipzig corporation to the proposed sale. The fact that the two Stoehrs did no such thing, is one of the most significant things in the case. If there ever was a case where it was necessary to communicate with the Leipzig corporation, this was such a case. The only explanation, in view of the ease of such communication *by wireless*, of the failure to communicate with the Leipzig corporation *by wireless*, is that the two Stoehrs in this country were confronted with this dilemma: EITHER THAT THEY WOULD HAVE TO TELL THE LEIPZIG CORPORATION OF THEIR REAL INTENT AND SO MAKE A RECORD CONFESSION OF THEIR MOTIVES, OR ELSE, IF THEY DID NOT DISCLOSE THEIR REAL INTENT, THE LEIPZIG CORPORATION WOULD REPUDIATE THE CONTRACT INSTANTLY.

Either hypothesis is inconsistent with the legal and equitable validity of the contract.

(12) The facts in the case, examined in their true relation and tested by the authorities and decisions make the conclusion inevitable that *there never was any intention to vest legal or beneficial ownership in the shares in the New York company.*

The sole status of the New York company, its sole right to bring this suit, is based upon its alleged legal or beneficial ownership in the shares. If it be not the legal and beneficial owner of the shares, then that legal or beneficial ownership is in the Leipzig company.

As was said by the Court in *The Proton (supra)* if the complainant be not the "owner" he "has no *locus standi* to criticize or complain of the condemnation" of the property. The sole recourse of the Leipzig company, if any, is to the Congress of the United States. *The Trading with the Enemy Act* provides that captured enemy property and its proceeds shall be disposed of "as Congress shall direct."

But the right of the Leipzig company, if any, to appeal to the Congress of the United States for the proceeds of the stock would have to be based upon its continued ownership of the stock at the time of the seizure, and that would involve a repudiation of the contract.

(13) In his opinion Judge Hand found that

(a) "The consideration was inadequate. It expressly omitted the good-will which must have had a substantial value and it fixed no present price at all, so that it insured nothing to the Leipzig company except a sale of one-fifth each year at the then book value of its 'hard assets'. If the shares fell in value the Leipzig company bore the loss, both in general value and in book value; if they rose, it did not share the gain except in so far as that was reflected in book values" (page 314; folio 539).

(b) He also said:

"Now Hans E. Stoehr was not acting alone for himself and his family. The record does not show how many outside shareholders there were in the Leipzig company, but they were many. He was in the position of selling for an apparently inadequate consideration to his family, property in which other persons were interested as well as they. The contract, if not, therefore, justified upon the principle of selling to Crassus a burning house, could not be justified at all; it was apparently a fraud. * * * It was not likely that Heyn, a capable adviser, should have seriously expected a contract with such infirmities to stand; indeed, it is not credible that the parties could have intended it as a commercial bargain at all, except it were, what it was not, a desperate catch at salvage" (page 314; folios 539-540).

(c) Judge Hand further held:

"Article five in terms provides that the remedy of the Leipzig company on default shall be one which is in substance strict foreclosure, and that after strict foreclosure there shall be no further right of action on either side. It is quite true that it does not expressly say that this shall be the only remedy, but in view of the conclusion of the article I should be disposed so to construe it, especially when, as I have said, there are elsewhere no express covenants to pay the purchase price. It is unexpected, to say the least, that an experienced lawyer like Heyn should

have introduced a clause of strict foreclosure in a genuine contract of sale, knowing it to create a forfeiture" (page 315; folio 540).

(d) Judge Hand next considered and disposed of the option theory and said:

"Therefore, I think I may say that it is demonstrated that neither was the contract intended to sell out in an emergency so as to escape putative capture, nor was it a genuine business transaction dependent upon an estimate of the mutual advantages of the parties." (page 315; folio 541).

(e) Judge Hand next comes down to the real basis of his decision and holds:

"THERE REMAINS ONLY THE POSSIBILITY THAT IT WAS NOT INTENDED TO REPRESENT THE REAL PURPOSE OF THE PARTIES AT ALL, BUT TO SERVE AS A COVER FOR ANOTHER PURPOSE. We are, moreover, not left to surmise as to what that purpose was, because the written statements of Hans E. Stoehr and Heyn just before the capture, very frankly disclose it. It was merely the continuation of what they had done in 1915, when they put the legal title in the name of Hans E. and Max W. Stoehr for convenience of management, and what they had done in the case of the partnership just before February twentieth, 1917, for the same reason. They wished to put their house in order against the disabilities and inaccessibility of their German associates during the period of a war which could certainly not go more than five years. This they did, so far as I can see, without the slightest anticipation of any confiscation of enemy property" (page 315; folios 541-542).

(f) Judge Hand next carefully analyzed the Heyn and the two Stoehr letters, and pointed out the fact that Heyn "was positively required to state the character of the relations arising under the contract of February twentieth, 1917, and his account of it was authoritative. There can be no question that, had the Leipzig company

had only a vendor's lien, it would have been a wrong upon Stoehr & Sons Inc. to fail to state its full rights. IN SAYING THAT THE 'CONTROL' FOR PURPOSES OF THE ACT WAS IN THE LEIPZIG COMPANY, I MAY FAIRLY SUPPOSE THAT HE HAD IN MIND THOSE PROVISIONS OF SECTION SEVEN (a) UNDER WHICH HE WAS ACTING; HE USED 'CONTROL' AS 'OWNED' " (page 316; folio 543).

(g) Judge Hand summarizes his conclusions as follows:

"Heyn and Hans E. Stoehr are now dead, but the aspect which the plaintiff seeks to put upon the contract is an apocryphal afterthought, which there is no reason whatever to suppose that they, were they alive, would now have the disposition, or the hardihood, to adopt. Their declarations *ante litem motam* fit that interpretation, which alone acquits them at once of any purpose to defraud either their associates, or the United States in its right as captor. I HAVE NO QUESTION THAT THE BENEFICIAL OWNERSHIP OF THE LEIPZIG SHARES WAS ALWAYS INTENDED TO REMAIN IN THE LEIPZIG COMPANY" (pages 316-317; folios 543-544).

Counsel for the appellant at various places in his brief endeavors to answer those arguments of Judge Hand.

At pages 73-74 he states that "the Leipzig company would be unable to participate in the management of the Botany Worsted Mills" and he says: "The general purpose of preventing the dismemberment of the Botany Worsted Mills was a sufficient reason for the purchase by the one and for the sale by the other of the parties".

Again at pages 78-79, he says: "The acquisition by this New York corporation of 14,900 shares of the stock of the Botany Worsted Mills WAS LIKEWISE INTENDED TO CONSERVE THE BUSINESS OF THE LATTER CORPORATION AND TO AVOID THE MISMANAGEMENT OR WASTE THAT MIGHT RESULT WERE THE CONTROL AND MANAGEMENT TO FALL INTO THE HANDS OF A SMALL MINORITY OF STOCKHOLDERS". At

page 57 he says "IT WAS ENTIRELY NATURAL, UNDER THE CIRCUMSTANCES, FOR SUCH A TRANSFER TO BE MADE".

There are two answers to his arguments: First, if the Leipzig company intended to sell the shares, IT WOULD LOSE EVERYTHING. It would lose the shares under the sale and it would lose the money or the right to the money, because it would be captured. In either event the Leipzig company would not be interested in "avoiding mismanagement or waste" in the Botany.

When he says, therefore, "it was entirely natural that such a transfer be made", he purposely does not answer the question—entirely natural for whom? He does not seem to claim that it was "entirely natural" for the Leipzig company to make the transfer. Thus he does not meet the cogent arguments of Judge Hand to the effect that the contract was not intended as written.

Again (at page 57) he refers to the contract "making it possible to preserve and conduct the business without embarrassment". But the answer is that if the contract was intended to be a sale, the Leipzig company would no longer be interested "to preserve and conduct the business without embarrassment", and that if there was a sale it would lose everything for the reasons stated.

When he argues that "the Leipzig company would be unable to participate in the management of the Botany Worsted Mills", and that it therefore recognized "the desirability of its retirement from the American field" (pages 73-74), he makes statements whose meaning is doubtful and vague. If the only purpose of the contract was that the Leipzig company was not to participate in the management of the Botany during the war, that would sustain the contention that the voting control only was to be placed in the New York company, and that the beneficial ownership remained in the Leipzig company.

All of those statements are merely an attempt to confuse the benefits to the New York company with alleged benefits to the Leipzig company, so as to lead to the con-

clusion that the contract was a prudent business transaction for the Leipzig company.

In the appendix to this brief we have demonstrated that the only course that could have benefited the Leipzig company was A SALE FOR CASH. Nowhere in his brief does counsel for the appellant meet those arguments nor answer *by facts* in the record the reasoning in Judge Hand's opinion which led him to the conclusion that as a commercial transaction the contract was "too open a fraud upon the Leipzig company to even admit of argument" (page 315; folio 541).

(14) In Point II of his brief, counsel for the appellant argues that

"There was nothing in our jurisprudence which contemplated that these shares of stock should, on the outbreak of the war be seized by our Government as enemy property, even in the absence of the contract of February 20, 1917" (page 41).

He then cites the case of *Brown v. The United States*, 8 Cranch., 109, and asserts:

"To say, therefore as appellees have contended, that this contract was made for the purpose of defeating the United States of its belligerent rights, is in total disregard of this accepted doctrine" (page 45).

Again, in Point III of his brief, he says (page 46):

"In determining the bona fides of the contract of sale as between the parties thereto and our Government, it is important to take into account the state of the law, as understood at the time when the contract was entered into, with respect to the effect of a possible war on privately owned property within our jurisdiction".

Then follows a voluminous citation of decisions, authorities on international law, treaties and the writings of publicists (pages 46-57) in an attempt to show that on February 20, 1917 it was a rule of international law that enemy private property on land was free from confiscation and capture. From this he argues that the parties can-

not be deemed to have attempted to avert a capture of the shares which they had no reason to think would be made by the United States in the event of war (page 53).

The fallacy of that is almost too obvious to require argument. The authorities which he cited may have been in point before the German war. But on February 20, 1917, the German war had already been waged for nearly three years. During that time all of the belligerents had captured and confiscated private property on land. Those captures and confiscations included debts, rights under contracts, bank balances, shares of stock and countless other kinds of property rights and interests, to an extent and nature before that time unknown in the conduct of war. Those captures and confiscations amounted to hundreds of millions of dollars, as is universally known. Therefore the pretense that the parties to the contract in February 1917 did not have the certainty of capture and confiscation of enemy property in their minds, is reduced to an absurdity.

To what extent war may change the rules of international law is illustrated in the chief case cited by counsel for the appellant, *Clarke v. Morey*, 10 Johns, 68, 72. In that case Chancellor Kent said that it might be regarded as the public law of Europe that the subjects of the enemy, so long as they are permitted to remain in the country, are to be protected in their persons and property. But he added the significant exception: "The anomalous and awful case in the present violent power upon the continent excepted". He was writing of the Napoleonic war.

We might say, in regard to all the authorities cited by the appellant, that they were rendered obsolete by the "anomalous and awful case" of Germany in the German war. The continued violations of international law by Germany led to modifications of the rules of international law which modifications must have been present in the minds of the parties on February 20, 1917.

Whatever may have been the "jurisprudence", to use his favorite word, prior to 1914, it is absurd to argue that

on February 20, 1917, the parties did not have in mind the possibility of capture. At that time the Republic of France, Great Britain, Canada, Australia and the then Empire of Germany each had exercised its sovereign right to capture enemy property on land. That fact was well known to those who participated in the attempted execution of the contract. It is absurd to say that the parties to the contract believed the state of the law to be as stated in appellant's Point III, when in fact during the war then in progress the principal warring powers *had* exercised the power of capture and confiscation. It was well known that in the anticipated event of the entry of the United States in the war it would exercise its sovereign right to capture enemy property.

(15) Counsel for the appellant (page 49) relies upon the Treaty of Amity and Commerce between the United States and Prussia of January 11, 1799. He relies upon Article XXIII thereof, which is as follows: "If war should arise between the two contracting parties, the merchants of either country *then residing in the other* shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely carrying off all their effects without molestation or hindrance."

He also relies upon Article XXIV of the Treaty, dealing with treatment of prisoners of war, providing that war should not be construed as "annulling or suspending this and the next preceding article; but on the contrary that the state of war is precisely that for which they are provided and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature and nations".

From these provisions he argues (page 53) that: "The vendor had the assurance that, even in the event of war, it would be protected in the enjoyment of its property, and that it would have the right, so far as it was capable of being carried away, to remove its property from our territory."

That argument is obviously unsound. The Treaty by its terms applied only to "merchants" of either country "*then*

residing" in the other. There is no conflict between *The Trading with the Enemy Act* and that Treaty. Under the terms of the *Act*, a German merchant residing in this country at the outbreak of the war did not become an "enemy", as defined in the *Act*, unless and until the President should by proclamation include such merchant within the term "enemy, if he shall find the safety of the United States or the successful prosecution of the war shall so require it".

It is well known that certain Germans in the United States were thus proclaimed "enemies" and were interned. But it is equally well known that only those were interned who were *proved* to be conspirators to commit arson, murder and assassination, to foment riots and resistance to the draft laws, or were caught in bomb plots and other criminal conspiracies to destroy human life and property on land and sea, or were using German money and German property in this country for the purpose of stirring up trouble in Mexico and other countries, and otherwise scheming and working in the interest of Germany and Germany's success in the German war.

Finally, Germany itself disregarded the treaty that the counsel now relies upon to restore the captured asset to a German company. Americans were not allowed, after April 6, 1917, "to remain nine months" in Germany "to collect their debts and settle their affairs" and then to "depart freely, carrying off all their effects without molestation or hindrance". On the contrary, their property was seized, and they were neither allowed to "depart freely" nor to "carry off all their effects without molestation or hindrance".

The Germans as "sacredly observed" the provisions of that treaty as they "sacredly observed" the provisions of countless other treaties and countless "articles of the law of nature and nations" that they ruthlessly violated.

(16) Counsel for the appellant goes so far as to assert that "even after April 6, 1917, and at any time prior to October 6, 1917, it could unquestionably have sold its shares under the protection of that treaty with Prussia proclaimed in 1800, and of the principles of international law

that we have discussed" (pages 55-56). That assertion overlooks the fact that trading and intercourse with the enemy is ILLEGAL AT COMMON LAW AND UNDER OUR LAW. It is emphatically not true that the Leipzig company could have made a sale of the shares in question at any time between April 6, 1917, and October 6, 1917, the date of the passage of the Act. The decisions of this Court on that point are many. The cases of "*The Rapid*", 8 Cranch., 155; and "*The Julia*", 8 Cranch. 181 make the point not even arguable.

(17) In Point II of appellant's brief, counsel for appellant says:

"But it is argued that the terms of sale were of such a character as to evince the intention that notwithstanding the transfer *the control* of the shares was to be left with the Leipzig company, and that there was in fact no sale" (page 59).

Again, at page 63, he states:

"But it is further argued that these provisions show that the Leipzig company reserved to itself *the control* of the shares of stock of the Botany Worsted Mills by virtue of this agreement".

We have *not* argued that the "*control*" of the shares was to be left with the Leipzig company. On the contrary we contend and the contention is abundantly supported by the admissions contained in the Heyn letter, that the purpose of the contract and the entries made on the books of the Botany purporting to be a transfer of the shares to the New York company, was to place the "*control*" of the shares in the New York company, which was in turn controlled by voting trustees. The beneficial ownership was to remain in the Leipzig company.

(18) On page 60 of the appellant's brief, he argues that:

"In lieu of interest on deferred payments, it was stipulated that, in addition to the book value of the shares,

there should be taken into consideration and account the amount of dividends received by the New York company during the period elapsing before the final payment of the several instalments".

This assertion is made in support of the contention that the contract was a justifiable commercial transaction and that "it was entirely equitable to both parties" (page 60). The record shows that the dividends declared by the Botany for the year 1917 amounted to 17%, for the year 1918 to 25%, and for the year 1919 to 25%. The parties to the contract had every reason to assume that the dividends on the shares would be approximately at the rate of those given for the years 1917, 1918 and 1919. It is not true therefore that the deferred payments were "in lieu of interest".

The provision about dividends was obviously put into the contract to give it an appearance of a bona fide sale, and thus to throw dust into the eyes of whatever government officer might examine into it. As there was no obligation on the New York company to make any payment, the provision about adding dividends to the payments was meaningless and was never intended to be acted upon.

(19) On page 62 of his brief, counsel for the appellant says that:

"It is further asserted that the failure to pay the first instalment when due operated as a re-transfer to the Leipzig company of the shares of stock, and that the nonpayment of an instalment of the purchase price for a single day after the date of its maturity operated as a forfeiture of the rights of Stoehr & Sons, Inc. to these shares. That conclusion is entirely at variance with the terms of the contract".

He then makes an elaborate argument to show that the forfeitures provided for in the fifth paragraph were dependent upon notice by the Leipzig company to the New York company.

We have not contended that the failure of the New York company to pay the first instalment "operated as a re-transfer to the Leipzig company of the shares of stock".

The Alien Property Custodian seized the shares not on the theory that there had been a re-transfer to the Leipzig company, but because the contract never transferred the shares to the New York company at all. As there had been no transfer on February 20, 1917, there could of course be no re-transfer on February 20, 1918. The argument of counsel for the appellant is based on a construction of the contract. The rights of the Alien Property Custodian to the 14,900 shares were not based upon a construction of the contract, but on the fact that, as Judge Hand stated in his opinion, the "beneficial ownership of the Leipzig shares was always intended to be left in the Leipzig company" (page 317), and that "there never was any transfer at all" (*ib*).

POINT II

The contract was signed utterly without authority of any kind

I

The contract was signed by "Kammgarnspinnerei Stoehr & Co., Actiengesellschaft, by Hans E. Stoehr." It purported to transfer a \$6,000,000 asset owned by the Leipzig company, which company had many stockholders, to a New York company, all of the shareholders of which were the four Stoehrs. It fixed extraordinary and unusual terms and a most unusual method of arriving at the price of sale. It made no allowance for good-will or trade-mark or trade-name values—a very large element of value.

It placed in the possession of the New York company, which then had on the stock book of the Botany the 5,690 shares, the immediate stock control of the Botany, and, through that stock control, the control of its directorate, its officers, its policy, its business, and of all its other financial

operations, and placed it in the power absolutely of the New York company to dominate the policy of the Botany, specifically to fix and control its financial status, to fix and determine what its earnings and surplus should be, to fix and determine the amount of bonuses and extra compensation to executives and their distribution, and absolutely to fix in its own unqualified discretion the book value of the very shares which were the subject of the contract, which book value determined the purchase price.

If it can be conceived that sane directors of the Leipzig company would, even under any conceivable circumstances, have authorized or approved such a contract, such authority or approval would have to be evidenced by the most express and explicit direction, not merely of the two German managing directors or of all the procuristen of the Leipzig company, but of the entire membership of its *aufsichtsrat*. Hans E. Stoehr must have had (a) either express or (b) implied authority to affix the name of the Leipzig company to the contract.

There is not a particle of evidence in the case of any express authority from the Leipzig company to him to sign the contract. The complainant admitted upon cross-examination that he had never seen any written authority from the Leipzig company relating to the contract, either by a managing director or any of the other parties, or any resolution of its board of directors, its *aufsichtsrat*, relating to the same (pages 125-126; folios 242-243).

The complainant however attempted to make out a course of dealings in which Hans E. Stoehr, as the complainant pretended, represented the Leipzig company, as tending to show that Hans E. Stoehr had implied authority to represent that company or was held out by that company as having such authority.

He first testified that Hans E. Stoehr voted the stock of the Botany at its stockholders' meetings (pages 110-111; folios 212-213) and that he so voted that stock in 1913 and 1914. He later corrected that statement by saying that when Eduard Stoehr, his father, was in the United States, he as chairman of the Leipzig company, voted the stock

at the stockholders' meetings of the Botany; that it was a rule that when his father was over here his father represented the Leipzig company, and that when his father was not at the stockholders' meetings, his brother Hans E. Stoechr voted the stock of the Leipzig company (pages 110-111, folio 213). Max W. Stoechr had said that when his father was not at the stockholders' meetings "my brother represented the firm."

Now, a reference to the undisputed facts as to the votes cast at the stockholders' meetings of the Botany, as shown by its minutes, from March 15, 1910 to May 28, 1910 (defendants' exhibit Y, pages 245-248; folios 449-450) demonstrates the falsity of that testimony. As appears by that exhibit, at the meeting held March 15, 1910, "Kammgarnspinnerei Stoechr & Co. voted in person 14,945" shares, and manifestly by Eduard Stoechr, for the next entry is, "Eduard Stoechr voted in person 4,185" shares. Eduard Stoechr was then one of the two directors of the Leipzig company. Hans E. Stoechr was *never* one of the two directors of the Leipzig company but was only a member of its *aufsichtsrat*. There is all the difference in the world between the power of the *two directors* of the Leipzig company and the power of *a member of its aufsichtsrat*. The two directors corresponded to the chief executives in an American corporation. The members of the *aufsichtsrat* were not shown to have any more authority than the usual authority possessed by a member of a board of directors or an executive committee of an American company, and in no case has either a member of the *aufsichtsrat* or of an American board or executive committee *as such* any power to commit the corporation. That distinction runs all through defendants' exhibit Y and is expressly shown in our cross-examination of Max W. Stoechr, who testified as follows:

"There is a director, and he has a so-called 'procuristen' to manage the business. This 'procuristen' here would be a director, and I really do not know how many there were in Leipzig. I do not know how many people had 'procuristen' for the

Kammgarn-Spinnerei in 1915, 1916 or 1917, for these people have no voting power; they are only managers of the business. The executive is the managing director. Georg Stoeck and Dr. Kuntze were the two executives of the company in 1916, the only two who could sign the company alone or separately; of the procuristen, two can sign together. When the company was dealing with banks or passing titles to the property, the signatures of either of the managing directors alone would be accepted, but that when we were dealing with the procuristen and when the company had to sign a document binding the company or transferring title, and the procuristen signed it, there had to be two of them, but as the procuristen changes from time to time their signatures had to be identified like bank signatures and they had to be stated officially as authorized to sign for the company" (page 125; folio 241).

It appeared from the uncontradicted testimony of Ferdinand Kuhn that when the father Eduard Stoeck was here "he represented the firm and voted in person as a director, an active director of Kammgarn-Spinnerei Stoeck & Company. Hans E. Stoeck was not a director, he was a member; he was not an active director of Kammgarn-Spinnerei; he was not a director at all. I mean in what we call in the Kammgarn-Spinnerei is a director. There are two official directors. . . . He was a member of the aufsichtsrath; that was all, as far as I know here" (testimony, page 164; folios 315-316).

At the annual meeting held March 21, 1911, "Antonio Knauth voted *as proxy* for Kammgarnspinnerei Stoeck & Co. 4,900" shares. At that meeting "Hans E. Stoeck voted *as proxy* for Commerzienrat E. Stoeck 4,335" shares, and "Hans E. Stoeck voted in person 720" shares (defendants' exhibit Y).

At the annual meeting of March 19, 1912, "Kammgarnspinnerei Stoeck & Co., a. g., represented by George Stoeck *in person*," voted 14,910 shares. "Hans E. Stoeck *as proxy*

for Eduard Stoechr voted 4,185" shares. "Hans E. Stoechr voted in person 785" shares. "Eduard Stoechr voted in person 555" shares. (*ib.*)

At the annual meeting of March 18, 1913, "Hans E. Stoechr voted *as proxy* for Kammgarnspinnerei Stoechr & Co., a. g., 14,910" shares. "Hans E. Stoechr voted *as proxy* for Eduard Stoechr 4,185" shares. "Hans E. Stoechr voted *as proxy* for Georg Stoechr 555" shares. "Hans E. Stoechr voted in person 785" shares. "Max W. Stoechr voted in person 100" shares. (*ib.*)

At the annual meeting of March 17, 1914, "Hans E. Stoechr voted *as proxy* for Kammgarnspinnerei Stoechr & Co., a. g., 14,900" shares. (*ib.*)

The defendants produced in evidence, as defendants' exhibit T-1, *the written proxy* of Kammgarnspinnerei Stoechr & Co. actiengesellschaft, by a Dr. Kuntz and one Hartz, who was one of the procuristen, duly witnessed, dated March 2, 1914 and empowering Hans E. Stoechr to vote at the annual meeting of the stockholders in March of that year. Defendants' exhibit Y shows the facts in reference to all of the above meetings, that the stock was voted by *proxies*, "Proxies at Mill."

The by-laws of the Botany, defendants' exhibit J, Article XVII (pages 225-228; folios 427-429), relating to "stockholders and elections," paragraph 3, expressly provided:

"At all meetings absent stockholders may vote by a proxy authorized by a *writing executed by the owner of the shares*. The president or other chairman of the meeting, and in case of an election, the judge of election, shall *judge the sufficiency of the powers of attorney produced*, but no proxy shall be voted on, allowed or received for more than three years from its date.

"Proxies shall only be given to shareholders of the company."

The foregoing facts, and the execution of that written proxy by the Leipzig company to Hans E. Stoechr, com-

pletely demonstrate the falsity of the assertion of Max W. Stoehr in his testimony that Hans E. Stoehr "was the *accredited representative* here of the Kammgarnspinnerei. *He voted their stock at their stockholders' meetings.*" Though he *voted their stock* at the stockholders' meetings (testimony of Max W. Stoehr, pages 110-111; folios 212-213), that vote was pursuant to a *written power of attorney* in every case and hence that was *no proof whatever* that Hans E. Stoehr had any *general authority* to represent the Leipzig company.

At the annual meeting of March 16, 1915, "Kammgarnspinnerei Stoehr & Co. actiengesellschaft represented by Georg Stoehr voted in person 4,910" shares. "Stoehr & Sons voted in person 5,600" shares. "Hans E. Stoehr as trustee voted in person 10,000" shares.

Those facts completely dispose of the attempt to prove "implied authority" so far as voting was concerned. The implication which Max W. Stoehr sought to have drawn from his testimony was that his brother Hans E. Stoehr stood upon the same footing, so far as the power to represent the Leipzig company was concerned, as did his father Eduard Stoehr, who was first one of the two directors and later a member and chairman of the aufsichstrat, or his brother Georg who succeeded his father as one of the two directors of the Leipzig company. The record of the Botany as shown by exhibit Y demonstrates the utter falsity of Max W. Stoehr's testimony on that point (defendants' exhibit Y).

In an attempt to show other transactions in which he claimed Hans E. Stoehr "represented" the Leipzig company, and in order to draw the inference that he was held out to be its agent, Max W. Stoehr testified that in 1914 the Leipzig company "sold worsted yarns over here which were supervised by Hans E. Stoehr" (page 111; folio 213); that the Botany had charge of those sales and that Hans E. Stoehr "negotiated them to the Botany" (page 111; folio 213); that Hans Stoehr "transmitted the sales"; that he "effectuated the sales"; that "the Kammgarnspinnerei Stoehr & Company offered yarns, or Botany Worsted Mills wrote over and asked for delivery of yarns," and that "was

a sale to the Botany Worsted Mills, and *all these affairs were directed by Hans E. Stoechr*" (page 111; folio 213).

But on cross-examination he was compelled to admit: "All these affairs were directed by Hans E. Stoechr. Mr. Stoechr signed the letters and he did all that was necessary in the form of negotiations. Hans acted for Botany and wrote the Kammgarn-Spinnerei; he signed the letter on behalf of the Botany Worsted Mills and the Kammgarn-Spinnerei wrote back to Hans. * * * They sold some yarns to the Botany Mills or some other customers, my brother Hans writing for the Botany Worsted Mills to the Kammgarn-Spinnerei, and they answered him. My brother Hans was representing at that time, as I said before, the Botany Mills, and the German house was being represented by either my brother Georg or my father over there" (testimony, page 111; folios 213-214).

It is apparent, therefore, that although the complainant first testified that Hans was "acting for both the Botany and the Leipzig company" in all the transactions, he finally admitted that in regard to transactions between the Leipzig company and the Botany *Hans E. Stoechr acted for the Botany*.

With respect to the sale of wool to other concerns than the Botany, where the Botany for the most part acted as selling agent of the Leipzig company (page 111; folios 214-215), he claimed that Hans E. Stoechr was the particular officer of the Botany who conducted those negotiations (page 111; folios 214-215).

With respect to those yarn transactions, therefore, the testimony of the complainant came down to this: That in the case of sales by the Leipzig company to the Botany Hans E. Stoechr did *not* represent the Leipzig company but the Botany mills, and that in the case of sales of yarns of the Leipzig company to concerns other than the Botany, the agent of the Leipzig company in this country was not Hans E. Stoechr but the Botany company. There is accordingly nothing in the testimony of the complainant with reference to those transactions to show any *general agency or any agency* of the Leipzig company to Hans E. Stoechr at all.

As to the inference which Max W. Stoehr sought to have drawn from his testimony regarding the voting of stock of the Leipzig company by his brother Hans E. Stoehr, Zimmerman testified (page 140; folio 271) that there was uniformly *written* authority from the Leipzig company to vote the 14,900 shares at the various meetings of the stockholders; that there was always *written* evidence of the right to vote; always a *written* proxy from the Kammgarnspinnerei to vote that stock (page 140; folio 271). We have shown that at the meeting of 1914 the *written proxy* to Hans E. Stoehr for the Leipzig company was signed by a Dr. Kuntz, who was one of the two directors, and by one Hartz, who was one of the procuristen (defendants' exhibit T-1, page 302; folio 518). The facts in connection with the voting by Hans E. Stoehr of the stock of the Leipzig company, therefore, far from showing that Hans E. Stoehr had *implied authority* or *any* authority to represent the Leipzig company in any other matter, go rather to show that in cases where Hans E. Stoehr *did* represent the Leipzig company he had *formal written, express authority in each case*.

Zimmerman testified that he had searched the records of the Botany for any *written power of attorney* purporting to be given by the Leipzig company to Hans Stoehr for the years 1915, 1916, 1917 and 1918 and that he had found no such authority or *any copy of a resolution from the board of directors of the Leipzig company*, or anything under the seal of the company, purporting to confer authority on Hans E. Stoehr (pages 143-144; folio 279).

With reference to the attempt of Max W. Stoehr to give the impression that Hans E. Stoehr represented the Leipzig company in yarn transactions, Zimmerman testified that he had examined the office files of the Botany company for correspondence between the Leipzig company and the Botany from the year 1913 to the end of 1916, the last communication (pages 162-163; folio 313). Approximately 100 to 150 letters were received by the Botany in that time, all addressed to the Botany, and signed by Kammgarnspinnerei Stoehr & Co. and then either signed

by two procuristen or by one procuristen and one managing director, or signed by the two managing directors (pages 162-163; folio 313). They were *all* addressed to the Botany Worsted Mills. The same was true of the ten or a dozen letters which passed between the Leipzig company and the Botany during that time relating to dividends on the stock in the Botany owned by the Leipzig company (pages 162-163; folio 313).

Zimmerman further testified that he had searched the files of the Botany for any letters authorizing Hans E. Stoehr to deal with any stock of the Leipzig company and that he had found no such letter (pages 146-147; folios 283-284). He also testified that he had searched the files of the Botany for any letters authorizing Hans E. Stoehr to deal with the balances of the Leipzig company and that he had found no such letter (pages 146-147; folios 283-284), and that the searches so made covered the years 1914, 1915 and 1916; and that there was no mail after 1916 (pages 146-147; folios 283-284).

Finally, the testimony of Max W. Stoehr that Hans E. Stoehr "represented" the Leipzig company in the yarn transactions in 1914 was directly and explicitly contradicted by the testimony of Ferdinand Kuhn, the president of the Botany company. Mr. Kuhn, as shown in defendants' exhibit V (pages 242-244; folios 445-446), was the treasurer of the company in 1914. As shown by the by-laws, defendants' exhibit J, the treasurer of the company had "general charge of the business" (Article VII, par. 1; page 225; folio 427). At the March meeting of the stockholders in 1915, Hans E. Stoehr was elected treasurer and Mr. Kuhn became second vice president. On the death of Hans E. Stoehr, Kuhn became *actze* "in directing the affairs of the company." He was elected by the new board as acting president on August 20, 1918 on the resignation of Prehn, and was elected president of the company at the directors' meeting of the present board March 17, 1919 (page 163; folio 314).

He testified that the transactions referred to in the testimony of Max W. Stoehr were made directly between the

two corporations, "were signed by the proper officers on both sides, either from Leipzig or in Botany" (page 165; folio 316). His attention being called explicitly to the testimony of Max W. Stoehr that in those transactions "*Hans E. Stoehr acted for both,*" Mr. Kuhn answered:

"I think those transactions were directly from the Kammgarnspinnerei with the Botany Worsted Mills. * * * The transactions were between the Kammgarnspinnerei Stoehr & Company and Botany Worsted Mills. Those transactions in the years 1913 and 1914 up to March 1915, were directly, were signed by the proper officers on both sides either from Leipzig or in Botany. I was the treasurer of the company in 1913 and 1914 and the chief executive of the company in that capacity and had charge of the transactions above referred to; I remember the sale of yarns. There was a great deal done in 1914 from January until the outbreak of the war in Europe; I think it was mostly yarns; there may have been a few goods. I had entire charge for the Botany Mills of those transactions; I was the treasurer responsible for it. It might be that certain letters were signed by somebody else at the mill of the Botany going to Kammgarnspinnerei, but they were signed by some officer of the Botany; as in the capacity of an officer of the Botany. I am not sure about every letter, every transaction, it might have been done by some other officials.

By Mr. Quinn:

Q In the course of his direct examination, page 46 of the stenographer's minutes, Mr. Max W. Stoehr testified relating to the transactions with Kammgarn-Stoehr & Company as follows:

'Your brother Hans wrote for the Botany Mills for the Kammgarn Spinnerei, and they answered him? A Yes.'

And on page 47 he was asked and answered thus:

'Q You think the Botany Mills for the most part acted, if I may say so, as selling agent?
A Yes.

'Q What particular officer of Botany Worsted Mills conducted those negotiations? A Hans Stoehr.'

Please state the facts of your own knowledge in regard to those transactions.

Mr. Vorhaus: I object to that.

Objection overruled" (testimony, pages 164-165; folios 316-317).

We then asked the following:

"Q Did the communications from Kammgarnspinnerei to Botany regarding those yarn transactions come from Kammgarnspinnerei direct to the Botany? A. Yes. * * * They came from Kammgarnspinnerei and the answers that went from the Botany went direct from the Botany to the Kammgarnspinnerei * * * .

Q In the course of his direct examination referring to these yarn transactions, Mr. Max W. Stoehr stated that in said transaction his brother Hans E. Stoehr '*acted for both*'; is that the fact?

Mr. Vorhaus: I move to strike that out.
Motion denied.

The witness (resuming):

"He acted for the Botany, as an official for the Botany" (testimony, pages 165-166; folios 317-318).

On cross-examination of Kuhn by counsel for the plaintiff as to the yarn transactions the following was the testimony:

"Q They were handled personally by Mr. Stoehr? I am not asking in what capacity, but Mr. Hans E. Stoehr handled those transactions? A No; I think

I handled those transactions. I did not go out as treasurer and sell the goods; our yarn representative sold them. The Botany bought those yarns from Stoechr & Company" (page 167; folio 320).

As to Hans E. Stoechr's *representing* the Leipzig company in this country, Mr. Kuhn's uncontradicted testimony was that when Eduard Stoechr was here he represented the firm "and voted in person as a director, an active director of Kammgarn-Spinnerei Stoechr & Company. Hans E. Stoechr was not a director, he was a member; he was not an active director of Kammgarn-Spinnerei; he was not a director at all; I mean in what we call in the Kammgarn-Spinnerei is a director. There are two official directors.

"By Mr. Quinn:

Q He never was either?

Mr. Vorhaus: I object to that.

The Court: There is no contradiction. It is exactly what your client has said.

The Witness (resuming): He was a member of the aufsichstrat; that was all, as far as I know here" (testimony, page 164; folios 315-316).

The plaintiff's testimony as to the *implied authority* of Hans E. Stoechr was thus completely disproved by the facts.

The attempt of the plaintiff and his counsel to establish implied authority *completely and utterly collapsed*.

II

In Point XVI of his brief (pages 126 to 143 inclusive) counsel for the appellant argues that the authority of Hans E. Stoechr to execute the contract "*is shown by the record*".

To establish that contention he quotes from the letter of Heyn & Covington the statement that "H. E. Stoechr *represented* his father and also Stoechr & Co., the Leipzig company, in this country". But he failed to quote the following which immediately preceded that statement:

"Eduard Stoehr, the father, and Georg Stoehr, the brother, were in charge of the Stoehr interests in Germany, and H. E. Stoehr and M. W. Stoehr of the interests in the United States". But that general statement of Heyn is completely disposed of by the following statement in Heyn's letter: "As we have also stated verbally, there have been no resolutions or other corporate action by Stoehr & Co., the Leipzig corporation, in confirmation of this transaction." If H. E. Stoehr had authority to "represent" the Leipzig company, no "resolutions or other corporate action" of the Leipzig corporation "in confirmation of this transaction" would have been necessary.

In further support of his contention that the authority of Hans E. Stoehr was "shown by the record", counsel for the appellant refers to the following facts:

- (1) Hans E. Stoehr was a member of the board of the Leipzig company.
- (2) He had the confidence of his associates on the board (there was no proof of this in the record and the appellant cites none).
- (3) He held a substantial interest in the corporation.
- (4) He had been in Germany in the spring of 1914;
- (5) Hans E. Stoehr held the legal title to 10,000 of the shares (pages 136-137, appellant's brief).

Notwithstanding the appellant's statement, the record is absolutely destitute of any proof that Hans E. Stoehr had authority to sign the contract. The authority or rather lack of authority that he had by reason of his being a member of the board has already been discussed. The fact that he had the confidence of his associates on the board (although there was no proof of this); that he had a substantial interest in the corporation (by which is apparently meant that he was a stockholder in the corporation); that he had been in Germany in the spring of 1914; and finally, that he held the legal title to 10,000 of the shares, cannot by any stretch of law be made to establish an authority on the part of Hans E. Stoehr to execute in the name of the Leipzig company and

on its behalf a contract disposing of an asset of the value of approximately \$6,000,000.

These flimsy statements establish beyond doubt that Judge Hand was correct in stating in his opinion that the authority of Hans E. Stoehr to execute the contract was at the trial "in no wise proved".

Finally, counsel for the appellant falls back upon a number of cases holding that the authority of an agent of a corporation need not be in writing (page 138) and that there is a presumption as to the power of officers of corporations. But the cases that he cites (pages 138-143) have utterly no relation to the facts in the case at bar. They were cases of persons dealing with corporations, accepting the contracts and obligations of corporations, signed by officers of corporations WHO WERE HELD OUT TO THE WORLD BY THE CORPORATIONS AS ITS OFFICERS AND CLOTHED WITH OSTENSIBLE AUTHORITY TO ACT.

Accurately stated, no "presumption" is necessary in such a case. The corporation by its own act in electing persons to official positions and representing them to the world to be its officers, is estopped from either questioning their authority or pleading any secret limitations upon the authority. The doctrine is for the protection of persons who deal with the corporations "in good faith and without actual notice of any inherent defect" in their authority.

The case at bar does not present the case of a person relying upon the ostensible authority of an officer. Even on the theory of presumption, those cases do not apply to the case at bar for the reason that the presumption is based on the fact that the person purporting to act for the corporation is an officer thereof or has been held out by the corporation as an officer, clothed with an officer's power. There was a complete absence of proof that Hans E. Stoehr had ever been an officer of the Leipzig company. On the contrary, the defendants affirmatively proved that he *never had been an officer* and was never anything more than a member of its board of directors. There was no proof even that he had been elected a member of its board of directors in 1916 or

1917. There could not be any presumption that he had acted within the powers of an officer when *there was no proof that he had ever had any powers as an officer of the Leipzig company at all.*

III

Counsel for the appellant in his point XVI (pages 138 to 145 inclusive) argues that the authority of Hans E. Stoehr to act for the Leipzig company was "shown by the record". He preceded his argument in that point by his point XV in which he claimed that "the existence of the authority cannot, under the circumstances, be questioned" (page 137).

Judge Hand in his opinion (page 312) said:

"I shall assume for argument's sake that a shareholder may bring a representative suit in the right of his corporation under section nine, and that the plaintiff here has shown a situation justifying his recognition in that capacity. I shall further assume, *though the fact is in no way proved*, that Hans E. Stoehr had a general authority which would cover the execution of contracts for the sale of such property as this for a consideration such as this. This assumption is all that the plaintiff has suggested he could prove if he had the chance to take proof in Germany".

Again at the close of his opinion Judge Hand (page 318) said:

"It becomes unnecessary to consider the prayer of the plaintiff for letters rogatory".

In view of the completeness of the proof offered by the defendants that, assuming that Hans E. Stoehr had authority to act for the Leipzig company, that company never intended to make the sale of the shares referred to in the contract, and because of the fact that on the outbreak of the war the contract became null and void, the argument

contained in appellant's point XV has no bearing upon the merits of the case or of this appeal. Furthermore, the claim made in point XV of appellant's brief that "the existence of the authority cannot, under the circumstances, be questioned", is not raised in any of the assignments of error, and is therefore not before the Court.

POINT III

The legal title to 14,900 shares never passed from the Leipzig company to the New York company

Counsel for the appellant (in Point I of his brief, page 17) practically admits that the legal title to the shares never passed to the New York company.

The provisions of the by-laws in regard to the transfer of stock of the Botany Company were so unusual and extraordinary that, without arguing the point here, we have summarized those provisions in the appendix for convenience of reference by the Court, if necessary.

POINT IV

Even on the face of the contract the ownership in the stock did not pass

Even on the face of the contract not only was it true that the legal title did not pass, but the beneficial interest or equitable title did not pass.

We have shown that Hans E. Stoehr never had a shred of authority to act for the Leipzig company in the transaction.

But in this point we will assume for the purposes of argument, that H. E. Stoehr *had* authority to execute the contract and that it was duly executed by the parties thereto.

Certificates of stock are not in and of themselves the equivalent of the shares of stock themselves. Shares of

stock are property *sui juris*. They are choses in action in a limited sense. Certificates themselves are mere evidence of ownership of stock. They are not identical with ownership. No general rule can be laid down regarding the transfer of title to stock. The particular facts of each case must be considered. By-laws may provide that title may be transferred either with or without the delivery of the certificates. By-laws may limit the transferability. They may attach conditions to transfers. They may require that the shares be offered to other stockholders. They may forbid transfers within certain periods when the books are closed. Certificates may on the face of them contain special provisions affecting transfers. The certificates themselves or the by-laws may contain almost any conditions or limitations upon the right of transfer that apply to all of the stockholders of a class equally and that are not inconsistent with the law. The by-laws may limit the time within which proxies may be used and they might even, in the absence of a provision of law to the contrary, provide that only stockholders present in person may vote.

No better example could be given of the lengths to which a corporation can go in special and unusual provisions relating to the transfer of stock than is afforded by the by-laws of the Botany company. But in all these cases the test is whether the law and the by-laws have been followed. Where the by-laws contain such peculiar and unusual provisions as those of the Botany, strict compliance with those provisions is necessary.

But even tested by the question of the intention of the parties, on the face of the contract, it conveyed no title or ownership in the stock.

Two facts, under the cases, show that on the face of the contract title did not pass, because (a) there was no obligation of the New York company to pay for the stock, and (b) the risk of loss always remained with the seller.

(A) THERE WAS NO OBLIGATION OF ANY KIND UPON THE NEW YORK COMPANY. In paragraph first of the contract the Leipzig company "hereby sells, assigns and transfers" to the New York company, but that paragraph did not

state that the New York company "hereby agrees to buy and to pay for the stock." But that is technical and we base our arguments on facts and not on technical principles.

While paragraph second defined "the terms of the sale and the purchase price for the shares," in that paragraph there was no *obligation* by the New York company to pay the purchase price.

Paragraph third was misleading, for it provided that the certificates "*shall be placed* in the possession of the Leipzig company as collateral security for the amount of the purchase price," whereas in fact there was not a scrap of evidence that the certificates were ever out of the possession of the Leipzig company. That part of the provision was obviously written in to give a misleading impression and to deceive government officers who might investigate the transaction.

Paragraph third also referred to the New York company having "the right to require the *redelivery of*" the shares. That was misleading, for it implied that there had been "a delivery" of the shares by the Leipzig company to the New York company, which was false in fact. There could be no "*redelivery of*" the shares to the Leipzig company when there had never been any "delivery" of the shares by the Leipzig company to the New York company.

So, also, following the reference to the "redelivery" of the shares, the words in paragraph third that "thereupon the Leipzig company shall continue to retain the remaining shares as collateral security for the balance of the purchase price still payable" were misleading, and designed to deceive any government officers who might examine the transaction.

While paragraph fourth of the contract purported to give the New York company the right "to require the deposit of the entire shares of stock or any balance thereof remaining in the hands of the Leipzig company, with a bank or trust company *to be selected by the Leipzig company*, such deposit to be made with such bank or trust company in escrow," that too was a misleading reference,

for it was well known to the New York parties that the New York company could not, on the breaking out of war, so "require the deposit of" the shares, and, tested by the imminence of war, that provision of the contract was meaningless and sham.

But the fact that THE NEW YORK COMPANY WAS UNDER NO OBLIGATION TO PAY THE PURCHASE PRICE, IS DEMONSTRATED COMPLETELY BY THE PROVISIONS OF PARAGRAPH FIFTH. That paragraph shows that the five periods of payment named in the contract were shams, for it expressly referred to and contemplated the event of "*any* of said annual instalments with said additions provided for in paragraph second, subdivision D thereof" not being paid when due, *and thus for practically indefinite default*. Then it provides that the Leipzig company must notify the New York company "*in writing*," a thing that the parties knew at that time would be forbidden during war, that it required the payment of the instalment then due with the additions, and "in the event that the New York company shall not within sixty (60) days after said demand pay the said instalment with the additions, then the said shares of stock or any remaining balance of said stock shall be forthwith *retransferred* to the said Leipzig company on the books of the Botany Worsted Mills."

The New York parties knew perfectly well that such a notification would be illegal on the happening of war and it was obviously their definite intention that (a) no "annual instalments" should *ever* be paid during the war, (b) that no sixty-day notice should ever be given by the Leipzig company until possibly after the war, when the notice would be given, the sixty days would elapse without payment, and the parties would be *in statu quo*.

That is made perfectly conclusive by the further provision of paragraph fifth that upon the "exercise by the Leipzig company of its sixty-day option" and the "retransfer" to the Leipzig company "all rights on the part of the New York company to said stock and any of said balance shall cease" and the Leipzig company shall retain the five thousand (\$5,000) dollars, paid on account as hereinbefore recited, "IN FULL SETTLEMENT OF ANY CLAIM AGAINST THE

NEW YORK COMPANY AND THEREUPON NEITHER OF SAID COMPANIES SHALL HAVE ANY FURTHER CLAIM AGAINST THE OTHER ARISING UNDER OR BY REASON OF THIS AGREEMENT." Again, they used the misleading word "retransfer". These provisions demonstrate that there was no obligation on the New York company to pay a dollar for a single share.

Taken as a whole therefore it is obvious that the contract was craftily drawn to give the surface appearance of a sale, but its loopholes and conditions and exemptions show that it was a one-sided contract, that it was not a bilateral contract at all, and that the New York company, when the test should come, was under no obligation whatever to pay anything or to perform in any way. No transfer of ownership can be founded upon such an agreement.

(B) THE RISK OF LOSS REMAINED WITH THE SELLER. The contract price was "book value" plus dividends. While a sale of stock according to book value is not unknown, there is usually an allowance for good-will. We never heard of a sale of a large block of stock at a book value *that made no allowance for good-will*—though good-will in this case is a large element of value—accompanied by (a) the immediate transfer of the shares into the name of the purchaser, (b) the immediate right in the purchaser to receive large dividends thereon, (c) the absolute power in the purchaser completely to dominate and control the company, (d) five years' credit, and (e) no responsibility whatever either to make the payments or to account for the dividends received in the meantime.

The seller, had the contract been an honest one, stood to lose in the following respects: (a) loss of book value by reason of the ordinary or extraordinary incidents of business, (b) no allowance for good-will, (c) loss of dividends received by the New York company, (d) loss due to a possible if not probable manipulation of the earnings and book value of the company by the purchaser, in its absolute and unrestricted discretion and control.

Under the by-laws of the company the executives were then entitled to 32 per cent of the net earnings of the com-

pany in any one year and this transaction vested the absolute stock control in the New York company and hence in the two Stoehrs. When it is recalled that there was nothing in the by-laws providing *how* that 32 per cent should be apportioned among the executives, it will be at once apparent what opportunities for plunder were put in the hands of the officials of the New York company, *all at the risk and to the loss of the Leipzig company.*

The peculiar thing in this contract was that it was, in effect, the sale of a majority interest at book value on a long credit and on extraordinary terms. A minority of stock might be sold at book value on credit, but it is difficult to believe that sane men would agree to the sale of a majority stock interest at book value and upon a five years or more credit, had the war lasted five years, and at the same time have put in the power of the purchaser absolutely to loot the company and to destroy or diminish at will the book value of its stock.

We will not attempt to discuss in detail the law as to the distinction between executory and executed contracts of sale, for we have demonstrated that no title to the stock passed to the New York company *even on the books of the Botany* and that, even had there been a real intention by the Leipzig company, the entire contract remained executory. But we will refer to a few cases that bear upon the subjects of this point, namely CONTINUED RISK IN THE SELLER AND NO OBLIGATION IN THE PURCHASER.

Admitting for argument that the question as to the transfer of the property depends upon the intention of the parties, that question is stated by Professor Williston in his work on *Sales* (§262) to be "essentially one of fact." After pointing out that in a contract reduced to writing "this question is determined by the Court, as also if the facts are so clear as to justify but one conclusion, yet the question is always one of fact, subject only to the presumptions given in the following section," Professor Williston adds: "Not too great stress must be laid upon the use of the words 'sell' or 'buy' by the parties. Those words are constantly used as meaning to include *contract to sell or contract to buy*" (*Williston on Sales*, 1909, §262).

Although *on the face of the contract* the Leipzig company retained the certificates, it cannot be said that it "retained security," for it put it fully in the power of the New York company to make the paper certificates in the hands of the Leipzig company worthless, to loot the Botany company, and to make the measure by book value a farce. There was no such thing in this case as the seller being able to *require the purchaser to perform*.

Nor was there, in the language of this Court in *Beardsley vs. Beardsley*, 138 U. S., 262, 265-267, anything like "an agreement to sell, where the moving party, the purchaser, *must within a reasonable time tender performance or make excuse therefor*." This Court in the *Beardsley* case, after stating that meaning is "not to be determined by any separate clause, but by the instrument as a whole," cited the decision in *Hereyford vs. Davis*, 102 U. S., 235, 243-244, where it is said that the contract was to be interpreted according to "the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account." And in the *Beardsley* case this Court quoted from its decision in the *Elgee Cotton Cases*, 22 Wallace, 180, 188, the third test as follows:

"Where the buyer is by the contract bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, *even though the goods may have been actually delivered into the possession of the buyer*."

Tested by that rule, the contract in this case never passed any ownership. The New York company was not "bound" to pay anything. It had to pay if it wanted to get the beneficial title in any of the shares, and the beneficial title in the stock therefor "*did not pass until that condition was fulfilled*."

The beneficial ownership in the stock as well as the legal ownership remained in the vendor.

The vendee would never have got the beneficial title to the stock until it paid for the stock.

There was a feeble attempt on the face of the contract to give the appearance of the vendor retaining a lien on the certificates. The assertion that only the beneficial interest passed contradicts the other parts of the contract which purport to pass the legal title.

While the actual decision in *Beardsley vs. Beardsley* (*supra*) was that there was a sale, the contract before this Court in that case was radically different from that in the case at bar. That was a contract at arms length, an unconditional declaration of a sale which carried on its face unqualified admission of intent to sell and had none of the elements that were so glaringly present in the case at bar.

Numerous cases could be cited where contracts made on the eve of war are closely scrutinized by the Courts to determine whether property in the goods claimed to be affected thereby has actually passed. We will refer to the following out of many.

In the case of *The Carlos F. Roses*, 177 U. S. 655, a Spanish bark was condemned as enemy's property. But a question was raised as to the enemy or neutral character of the cargo. That depended chiefly on the effect of the endorsement of the bills of lading to neutrals. The cargo was claimed by Kleinwort Sons & Company, British merchants. It consisted of jerked beef and garlic and was shipped at Montevideo in March 1898 by Gibernau and company, merchants of that place but citizens of the Argentine Republic. The invoices stated that the goods were shipped "to order for account and risk and by order of the parties noted below".

In the case of the jerked beef the consignees noted below were: "the expedition or voyage of the Carlos F. Roses", and "Mr. Pedro Pages of Havana", all concerned being Spanish subjects. The consignees of the garlic were "Mr. Pedro Pages" and the "undersigned, Gibernau and company." There were three sets of bills of lading issued by the master to Gibernau

and company, one for that part of the shipment of jerked beef made for the account of the vessel, another for that part made for the account of Pages, and a third for the shipment of garlic for the joint account of Pages and Gibernau and company. The bills set forth that the goods were taken "for account and at the risk of whom it may concern." The ship's manifest was signed March 15, and the destination of the cargo was stated thus "Shipped by Pla Gibernau & Co. To order". The *visa* of the Spanish consul read: "Good for Havana, with a cargo of jerked beef and garlic". There was no charter party.

On the face of the papers, the Court held that the goods when delivered to the vessel became the property of the consignee named in the invoice, but that as Gibernau and company had not appeared and claimed any interest, the whole cargo, which the claimants in fact admitted to be "ultimately destined for Don Pedro Pages of Havana", must be condemned as enemy property, unless cause to the contrary were shown. Such cause Kleinwort Sons and company endeavored to establish on the ground that after the shipment of the cargo they made advances upon it to the amount of about \$30,000, in consideration of which the bills of lading, endorsed in blank by Gibernau and company, were delivered to them with the intent that they should take title to the bills and the cargo, and on the arrival of the latter at its destination, hold it as security with the right to dispose of it and reimburse themselves with the proceeds.

They contended that in that way they became the lawful owners both of the bills and of the cargo. It appeared, however, that in neither of the two bills of exchange which were drawn on Kleinwort and company, for the amount of the advances, was any reference made to the cargo, and that while two of the bills of lading were alleged to have been delivered to the firm at the time of its acceptance of the bills of exchange, the third, for the greater part of the jerked beef, *was not delivered until long afterwards.*

On these and other facts this Court held that the cargo never *bona fide* passed and it remained the property of Spanish subjects and was liable to condemnation.

In *The Benito Estenger*, 176 U. S. 568, the facts were:

The Benito Estenger was captured by the United States steamship Hornet on June 27, 1898, off Cape Cruz, on the south side of the island of Cuba. On December 7, 1898, she was condemned by the United States District Court as enemy property. The claimant appealed on the ground, among others, that she was a *British merchant ship*, duly documented and entitled to protection of the British flag, and lawfully owned and registered by a British subject domiciled in Great Britain. It appeared that prior to June 9, 1898, the vessel was the property of Enrique de Messa, a Spanish subject resident in Cuba, and that on that day a bill of sale was made by de Messa to the claimant, Beattie, a British subject, and the vessel registered as a British vessel, at Kingston, in accordance with the requirements of British law. She had been engaged in trade with the island of Cuba, and more particularly between the ports of Kingston and Montego, Jamaica, and the port of Manzanillo, Cuba. She left Kingston on June 23, and proceeded with a cargo of flour, rice, corn meal, and coffee to Manzanillo, where the cargo was discharged. She cleared from Manzanillo on June 27 for Montego, and thence for Kingston, and was captured on the same day off Cape Cruz.

According to de Messa's story, he was compelled to sell the steamer in order to get money to live on, and he made the sale for \$40,000, for the whole or a large part of which credit was given on an indebtedness to the firm of which Beattie was a member, and that he was employed by Beattie to go on the vessel as his representative and business manager. Beattie in his testimony said that the sale was *bona fide*, but declined to state of what the payment of the purchase money consisted. The Consul of the United States at Kingston testified that Beattie in conversation, while insisting that the transfer was absolute, admitted that it was effected for the purpose of protecting the vessel. Ap-

parently no money passed. The Spanish master and crew remained in charge. De Messa went on the voyage as supercargo. In the brief of the claimant's counsel it was declared that the transfer was obviously made to protect the steamer as neutral property from Spanish seizure, while it was admitted that de Messa "*still retained a beneficial interest after this sale and transfer of flags*".

On those facts this Court observed that "transfers of vessels *flagrante bello* were originally held invalid", but that the rule had been "modified", and is thus given by Mr. Hall, who after stating that in France "their sale is forbidden, and they are declared to be prize in all cases in which they have been transferred to neutrals after the buyers could have knowledge of the outbreak of the war", says: "In England and the United States, on the contrary, the right to purchase vessels is in *principle* admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinized, and *the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war*". Hall *International Law* (4th ed.) 525.

The decree of the District Court condemning the vessel was accordingly affirmed by this Court.

In *The Venus*, 8 Cranch 253 (1814), a vessel sailed from Liverpool for New York prior to the declaration of the war of 1812. She was captured on August 6, 1812 by an American privateer. A part of the cargo which was condemned as lawful prize was certain goods shipped from England *via* certain American citizens resident in England (who were held to have acquired an enemy character) to citizens of the United States in New York. In a letter from the shipper in Liverpool to the consignee in New York covering an invoice of those goods the shipper said: "They are to be sold on joint account or on mine at your option."

It was held that the property in the goods did not pass from the English resident to the American citizen until the option was exercised, *and until that election was made the goods were at the risk of the shipper*, which was conclusive as to the right of property.

This Court said at page 274 :

"The whole question as to the exclusive property of Jones in these goods, is rested, by the captors, upon the above expressions giving an option to Magee to be jointly concerned or not in the shipment. The question of law is *in whom the right of property was at the time of capture?* To effect a change of property, as between seller and buyer, it is essential, that there should be a contract of sale, agreed to by both parties; and if the thing agreed to be sold, is to be sent by the vendor to the vendee, it is necessary to the perfection of the contract, that it should be delivered to the purchaser or his agent, which the master, to many purposes, is considered to be. The only evidence of a contract, such as is now set up, appears in the affidavit of Magee, who states, that in 1810, he was in England, and agreed with Jones, that the latter should ship goods on joint account, when the intercourse between the two countries should be opened; and that in consequence of this agreement, the present shipment was made. Now, admit that such an agreement was made, yet the delivery of the goods to the master of the vessel was not for the use of Magee and Jones, any more than it was for the use of the shipper solely; and consequently it amounted to nothing so as to divest the property out of the shipper, *until Magee should elect to take them on joint account, or to act as the agent of Jones. Until this election was made, the goods were at the risk of the shipper, which is conclusive as to the right of property.*"

In *The Frances*, 8 Cranch 353 (1814), certain goods were shipped by a British subject resident in Glasgow and consigned to a firm in New York. The bill of lading was in the name of the New York firm and the invoice purported to be on their account and risk. A letter from the shipper to the consignees stated that

"I have exceeded in some articles and have sent you others not ordered. I leave it with yourselves to take the whole of the two shipments or none at all, just as you please. If you do not wish them I will thank you to hand the invoices and letters over to Messrs. Falconer & Co. I think 24 hours will allow you ample opportunity to make up your minds on this point; and if you do not hand them over within that time, I will, of course, consider that you take the whole."

It was argued on behalf of the claimants that by the invoice and bill of lading and the letter above quoted the property was vested in the New York firm liable to be divested by their rejecting the consignment, within 24 hours after receiving the letters; that the condition annexed to the transfer was subsequent, not precedent.

It was held however that the property did not vest in the consignees *until they had exercised their option*.

This Court said at page 356:

"Had Thomson (the shipper) in execution of the orders of Dunham and Randolph (the consignees) consigned unconditionally such goods as they had directed, the contract would have been complete, and the goods would on being shipped have become the property of Dunham and Randolph. But Thomson has not done this. With the goods which were ordered he has consigned other goods, expressly stipulating that Dunham and Randolph shall not take the goods they had ordered, *unless they consent to take the whole quantity put on board both vessels*. This then is a new proposition on which Dunham and Randolph are at liberty to exercise their dis-

cretion. They may accept or reject it; and until they do accept it, the property must remain in Thomson. The sentence of condemnation, therefore, in this case, was warranted by the evidence before the Circuit Court."

In *Hopkins v. Davis*, 23 App. Div. 235, 236-237, the owner of a mare parted with her possession to a prospective purchaser under an agreement that the latter would train her, enter her in races, and if she won any stakes in the first three races in which she started, he would pay for her a price named. It was held that the purchaser obtained no title unless he made full payment and the owner was entitled to maintain replevin for the mare against one who had acquired her from the original vendee.

The Court said:

"It was at most an executory contract of sale, only to be effective upon the contingency that the mare should in the first three races succeed in winning some portion of the stake. In case she did not succeed in winning some portion of a stake, there was no agreement whatever between the parties for her sale. Unless credit be expressly or impliedly given, the law presumes that payment is to be made in cash upon the delivery of the article sold. This right may be waived by the vendor by making delivery without exacting payment".

In *Dunnigan v. Crummey*, 44 Barb. 528, an agreement was entered into between the plaintiff and defendant for the sale of a machine by the plaintiff to the defendant, and there was a delivery and an acceptance of a portion of the machine. That portion of the machine not delivered was taken by the plaintiff to a machine shop, at the request of the defendant, for the purpose of being cleaned, which was to be done at the joint expense of both parties. After the cleaning was completed, it was paid for by the plaintiff and that portion of the machine taken by him and tendered and offered to be delivered to the defendant.

While it was held that there was a valid sale of the machine, and not merely an executory contract of a sale, where something remained to be done on the part of the vendor before the delivery of the property, the Court said at page 533:

"In *McDonald v. Hewett* (15 John, 349) Spencer, J. lays down the following rule: '*The distinction between executory and executed contracts is well defined. The former conveys a chose in action, the latter a chose in possession,*' (citing several authorities). '*The decisive test, in cases of this kind, is to consider at whose risk the subject of the contract was.*' It should also be observed that the doctrine in regard to contracts being executory where some act remains to be done, mainly relates to cases where no portion of the property has been delivered".

In *Cunningham Iron Co. v. Warren Manufacturing Co.*, 80 Federal Reporter 878, 879, it was held that an agreement for the sale of steam boilers then in place in a factory, which provided that they shall be taken out and delivered before a certain time, was an executory contract and was not rendered operative to pass title by a statement in the memorandum of sale that the vendee "*purchased the * * * boilers*".

The Court said:

"From the fact that the boilers were in use and bricked in at the defendant's factory, to be taken out by the defendant, at such time prior to November 1, 1895, as the defendant chose, I am of the opinion that *the contract was an executory contract, which did not pass title to the plaintiff, since something was to be done to make delivery possible, and to be done by November 1st, which made time essential, and gave a right to the plaintiff to rescind for failure to perform the agreement within the stipulated time. The fact that the memorandum of sale states 'Cunningham Iron co. purchased * * * the thirteen*

72" boilers' etc., does not in my opinion render the transfer of title complete, in view of the foregoing facts. *Hatch v. Oil Co.*, 100 U.S. 124; *Jones v. U.S.* 96 U.S. 24, 28".

In *Anderson v. Read*, 106 N. Y. 333, 344, it was held that the word "sold" in a contract of sale of chattels does not necessarily import an *executed* contract; that where, by the terms of the contract, some material act remains to be done by the vendor before he can insist upon making delivery or can claim payment, such word is to be construed as meaning "contracted to sell", and the contract is merely an *executory* one.

The Court said:

"We are quite clear that the contract in question was *executory*, and in that respect we differ from the learned trial judge.

"It is true that the contract uses the words 'we have today sold to Messrs. R. W. L. Rasin,' etc. But that language must be construed in connection with the rest of the contract, which must be taken as a whole, and such construction placed upon it as the language used in the entire instrument calls for. Looking at the contract in this light, it will be seen there are two facts which render it entirely clear that it is in its nature a *purely executory* one. One fact is, that there was to be an analysis of the superphosphates by a New York or a Georgia chemist before delivery or payment, as provided for by the contract, could be insisted upon. Perhaps the vendee might, if he chose, waive the analysis and trust entirely to the guarantee and thus accept delivery without it. But the vendor could not compel an acceptance or claim payment without an analysis, and therefore, no title passed upon the signing of the agreement. In this respect there is no material distinction between this case and *Russell v. Nicoll* (3 Wend. 112). The language there used was 'sold by Daniel Rapelye', etc. But because upon a perusal

of the whole contract it was clear that the property sold was to arrive in New York before a certain date *as a condition of the sale*, the court said that such arrival must precede the change of title, and that the contract was executory; that the word *sold* used in the contract meant contracted to sell. It is the same here. The word used means the same—'*contracted to sell*', because some material act had yet to be performed by the vendor before he could insist upon making delivery or claim payment for the goods."

In *Decker v. Furniss*, 14 N. Y. 611, 615, the Court said:

"The question then is, whether the written agreement concerning the vessel passed the title to one-half immediately to the defendant, and this inquiry is by no means free from difficulty. There is no doubt that the phrase which stands at the commencement of the contract, 'William H. Brown *sells*' etc. imports of itself an executed sale. But the books furnish abundant evidence that phrases of this kind are used in a very loose sense, and that *their literal signification is often overruled by the tenor and purpose of the whole instrument*. So a party to a contract may say 'he agrees to sell', and yet the intention be entirely manifest that the title shall pass immediately. *Such phrases are quite inconclusive, and are often made to yield to other terms of the contract evincing a different design*".

Again, page 619:

"I AM INCLINED TO REGARD THE CONTRACT AS WHOLLY EXECUTORY, ALTHOUGH THE WORD 'SELLS' IS USED IN THE FIRST CLAUSE, WHICH, IF STANDING ALONE, WOULD IMPORT A PRESENT, UNCONDITIONAL SALE, AND SO FAR AN EXECUTED AGREEMENT. *But it is connected with other terms and provisions*, leaving it quite satisfactory to my mind that it was not the intention of the parties that there should be a

joint ownership of the vessel until she was fitted and ready for the joint adventure contemplated by the agreement”.

In *Hatch v. Oil Company*, 100 U. S. 124, 131, this Court said:

“If the *property* by the terms of the agreement passed immediately to the buyer, the contract was deemed a bargain and sale; but if the property in the thing sold was to remain for a time in the seller, and only pass to the buyer at a future time *or on certain conditions inconsistent with its immediate transfer, the contract was deemed an executory agreement.* Contracts of the kind are made in both forms, and both are equally legal and valid; but the rights which the parties acquire under the one are very different from those secured under the other. Ambiguity or incompleteness of language in the one or the other frequently leads to litigation; but it is ordinarily correct to say, that whenever a controversy arises in such a case as to the true character of the agreement, *the question is rather one of intention than of strict law,* the general rule being that the agreement is just what the parties intended to make it, *if the intent can be collected from the language employed, the subject matter, and the attendant circumstances.”*

While in the English prize cases and in certain of the American ship cases it has been said that mere intent to avoid capture is not sufficient, we have, we submit, demonstrated that in the case at bar there was more than the intent to avoid capture; that THERE WAS THE INTENT TO RETAIN THE PROPERTY IN THE LEIPZIG COMPANY; THAT THERE NEVER WAS IN FACT ANY INTENT TO MAKE A GENUINE TRANSFER; that the seller did not part with ITS BENEFICIAL INTERESTS IN THE PROPERTY, and never intended to, and that, tested by all the rules, THE CONTRACT NEVER BECAME EXECUTED IN ANY PART OR RESPECT.

POINT V

The contract became void and was abrogated and dissolved on April 6, 1917, when the United States declared that it was at war with Germany

I

A large part of the support which the United States gave to the allies in the war was financial. All of the belligerents were directly concerned in maintaining their credit and the parity of exchange during the war, not only in Europe but in South America and the Orient. Anything which promoted the business and financial interests of enemy countries or citizens or subject of enemy countries, including the maintenance of their credit, was a military advantage, and anything which lowered their credit was a military disadvantage. In a war of world-wide extent the old forms of trading with the enemy, *involving largely the physical transfer of tangible goods*, became obsolete. The entry of the United States into the war, followed by a general embargo, went far to put a stop to the surreptitious smuggling of goods into Germany through the territories of contiguous neutrals. *The war was fought with money as well as with men.* It was a great advantage to Germany to keep up the purchasing power of the mark. Anything which would tend to beat down the value of the mark was of advantage to the Allies and to the United States.

The Trading with the Enemy Act was approved October 6, 1917. It was the subject of careful consideration by both the House and the Senate.

The report on the *Act* submitted to the Senate August 15, 1917, by the Senate Committee on Commerce contains a summary of the provisions of the *Act*, and a brief digest of (a) the American trading with the enemy cases, and (b) the "English cases during the present European war". We quote from the report as follows:

"Trade with the enemy is unlawful under the common law both in England and the United States. (See memorandum of American cases submitted as an appendix) In England it has always been a common law criminal offense (*Regina v. Castro* (1880), 5 Q. B. D., 490). In the United States, so far as such trade is criminal, it must be made so by Federal legislation, there being no common law of crimes. Such trade has a civil aspect—being unlawful, the acts of all parties engaging in such trade are void, or their rights and remedies are suspended during the war. * * *

"The questions of what constitutes trade with the enemy and what constitutes an enemy within the purview of the illegal trade are settled by the decisions of the English and of the American courts. These decisions constitute part of the common law of the two countries. *Strictly speaking, they are not founded on international law.* They are purely domestic decisions, founded on such view of public policy as the courts of each country decide to adopt, *paying attention, however, to the general consensus of other countries as to what shall constitute a wise public policy in dealings affecting outside countries.*

"It follows that when the legislature of a country enacts a statute relative to trade with the enemy containing provisions differing from the law laid down by the courts, *it is not violating or departing from international law.* It is simply expressing its views as to the need of change in the domestic law of the country. Each country must decide for itself what it shall regard as unlawful trade with the enemy, and also what persons it shall regard, for the purposes of such trade, as enemy.

"Changes in economic, commercial, financial, military, naval, and political conditions may make it highly necessary that doctrines as to trade with the enemy laid down by our courts *a century ago* should be modified by the legislature either by mak-

ing them more stringent or less stringent, according to the needs and conditions of the present day. The complexity of modern business demands *far greater stringency in certain directions* than the old cases decided by the Courts provided for. On the other hand, the more enlightened views of the present day as to treatment of enemies make possible certain relaxations in the old law.

"In former days, trade consisted wholly in the actual transfer and transport of commodities. To-day a form of trade even more helpful to the enemy consists of transfer of credits and money by letter, cable, or wireless. Hence, while formerly the mere accumulation of enemy property or funds in this country did not assist the enemy materially, so long as it remained here, NOW WITH THE READY EASE BY WHICH CREDITS MAY BE TRANSFERRED AND FUNDS USED IT BECOMES JUST AS IMPORTANT TO PREVENT AN ENEMY FROM BUILDING UP, USING, OR TRANSFERRING HIS CREDIT OR CREDITS AS FROM ACTUALLY TRANSFERRING PHYSICAL PROPERTY. HENCE MUCH MORE RIGID SUPERVISION OF SUCH TRANSACTIONS BECOMES NECESSARY. * * *

"It is necessary always to bear in mind that a war cannot be carried on without hurting somebody, even, at times, our own citizens. The public good, however, must prevail over private gain. As was said in *Bishop v. Jones* (28 Texas, 294), there can not be 'a war for arms and a peace for commerce'".

It would unnecessarily extend this brief to attempt to digest, or even refer to, all of the decisions on the effects of war on contracts made before the countries with whom the contracting parties were nationals became enemies. Most of the cases down to 1915 are digested in the supplement to Trotter's work on *The Law of Contract during War*, revised edition London, 1915, in particular, *Section 12* relating to "executory contracts made with an alien enemy before the outbreak of the war", pages 45 to 60

inclusive, which contains a rather full reference to most of the old American cases.

Moore's Digest of International Law, Volume VII, 1906, contains a digest of the cases decided down to 1905 (pages 237 to 254, Sections 1135-1140).

It is unnecessary to digest the old American and English cases and a full consideration of the recent decisions of the English Courts during the German war is also unnecessary.

It is enough to say that *all executory contracts become invalid on the breaking out of war*. The two latest and best English cases are the *Zinc Corporation, Ltd., v. Hirsch* (1916) 1 K. B. 541, and *Bieber & Co. v. Rio Tinto Co.* (1918) App. Cases 260, House of Lords.

As was said in the case of *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft*, (1918) 1 K.B. 331, prior to the outbreak of the German war, the law as to intercourse between enemies and the effect of war on contracts was but little understood. What the Court said on that subject (page 337) is significant:

"It must be remembered that in 1912 the state of the law as to intercourse between enemies and as to the effect of the outbreak of war on contracts was but little understood. Lawyers were in doubt and laymen in confusion as to the law when events of August, 1914, broke out. Much argument was needed and several decisions were required ere the law as it now stands was settled".

That case was decided before the decision of the House of Lords in the case of *Ertel Bieber & Co. v. Rio Tinto Co.*, (1918), A.C. 260, herein referred to.

When the *Naylor case* (*supra*) came before the Court of Appeal on June 26, 1918, the Court, (Pickford, L.J.) said:

"After the judgment of the House of Lords in *Ertel Bieber & Co. v. Rio Tinto Co.* this case is unarguable. The appeal will therefore be dismissed".

Naylor, Benzon & Co. Ltd. v. Krainische Industrie Gesellschaft (1918) 2 K.B. 486.

It is not too much to say that the decisions of the English courts in the *Zinc* case and in the *Rio Tinto* case have clarified to an extraordinary degree the law on the entire subject. They disregarded all technical tests, and completely swept aside as utterly irrelevant the confusing distinctions based on some early and not well-reasoned decisions, as to *executed* and *executory* contracts, and laid down one plain, clear and final rule, and that is, THAT ALL CONTRACTS, THE FUTURE PERFORMANCE OF WHICH MIGHT INVOLVE TRADE OR INTERCOURSE WITH AN ENEMY BECAME ILLEGAL AND VOID ON THE OUTBREAK OF WAR, AS CONTRARY TO PUBLIC POLICY.

The following is an accurate statement of the principles of law established by the English cases:

A contract is abrogated by the war which either involves or MIGHT involve intercourse with the enemy or the continued existence of which is in any other way against public policy as laid down in the decided cases. *Zinc Corporation Limited v. Hirsch* (1916) 1 K. B. 541; *Naylor, Benzon & Co. Limited v. Krainische Industrie Gesellschaft* (*supra*); *Ertel Bieber & Co. v. Rio Tinto Co.* (*supra*).

Where the suspension of the contract during the war and its revival after the war would be in effect to create a new contract between the parties, THE CONTRACT IS DIS-SOLVED BY THE WAR. *Distington Hematite Iron Co. Limited v. Posschl & Co.* (1916) 1 K. B. 811; *Naylor Benzon & Co., Limited, v. Krainische Industrie Gesellschaft* (*supra*).

It is immaterial whether the contract between the subject or citizen and the enemy is beneficial to the citizen or subject or not. *Naylor case* (*supra*); *Ertel Bieber case* (*supra*).

Because of the admirable grasp of principles, because of the lucidity with which those principles were applied, because of the superb disregard of mere technicalities shown in those great English cases, we have taken the liberty of making a rather full digest of them in the appendix of this brief.

While we think that the rules laid down in the late English cases are the sound ones and state the true and the wise view of the great questions of public policy involved, it is not necessary for this Court in this case to go the full length of those decisions in order to hold that the contract became void and was dissolved on the outbreak of war. The English Courts in those cases held that all contracts that "*might*" involve intercourse with the enemy were dissolved on the outbreak of war. They disregard the limitation implied in the word "commercial". They hold that any contracts that MIGHT involve intercourse with the enemy, and not merely contracts that NECESSARILY involve intercourse with the enemy, become void and are dissolved on the outbreak of war.

Some old decisions of our Courts did not go that far and seemed to limit the doctrine to the *commercial* intercourse, as in the case of *Williams vs. Paine*, 169 U. S. 55, 70 (1897).

The case of *Kershaw vs. Kelsey*, 100 Mass. 561, is frequently quoted as an illustration of the so-called "suspension theory". But even that decision expressly recognized the rule condemning "commercial intercourse", for Mr. Justice Gray there said, at pages 572-573:

"The law of nations, as judicially declared, prohibits ALL INTERCOURSE BETWEEN CITIZENS OF THE TWO BELLIGERENTS WHICH IS INCONSISTENT WITH THE STATE OF WAR BETWEEN THEIR COUNTRIES; and that this includes any act of voluntary submission to the enemy, or receiving his protection; AS WELL ANY ACT OR CONTRACTS WHICH TENDS TO INCREASE HIS RESOURCES; AND EVERY KIND OF TRADING OR COMMERCIAL DEALING OR INTERCOURSE, WHETHER BY TRANSMISSION OF MONEY OR GOODS, OR ORDERS FOR THE DELIVERY OF EITHER, BETWEEN THE TWO COUNTRIES, DIRECTLY OR INDIRECTLY, OR THROUGH THE INTERVENTION OF THIRD PERSONS OR PARTNERSHIPS, OR BY CONTRACTS IN ANY FORM LOOKING TO OR INVOLVING SUCH TRANSMISSION, OR BY INSURANCES UPON TRADE WITH OR BY THE ENEMY."

While it is true that in that case Mr. Justice Gray said that "the more sweeping statements in the text books are taken from the *dicta* which we have already examined, and in none of them is any other example given than those just mentioned", yet under the DECISION in *Kershaw v. Kelsey* the contract in the case at bar became void, for it involved, and necessarily involved, "commercial dealing or intercourse"; it involved "*a contract which tended to increase*" the enemies' resources, for to uphold it would preserve the resources of the enemy during the war and take that much resources from the United States during the war.

Mr. Justice Gray expressly referred to "*contracts in any form looking to or involving such transmission.*" The contract in the case at bar was precisely such a contract, FOR IT CONTAINED NO PROVISION THAT IT SHOULD BE SUSPENDED DURING THE WAR.

A reference to the digest of the late English decisions, in the appendix to this brief, will show that the English Courts have held that EVEN WHERE THE CONTRACT CONTAINED EXPRESS PROVISIONS FOR SUSPENSION DURING WAR, it was abrogated on the outbreak of war, on the grounds of public policy, as tending to increase the resources of the enemy available after the war or tying up the resources of English nationals during the war.

In *The William Bagaley*, 5 Wall. 377, 407 (1866) this Court said:

"Executory contracts with an alien enemy, or even with a neutral, if they can not be performed except in the way of commercial intercourse with the enemy, are *ipso facto* dissolved by the declaration of war, which operates to that end and for that purpose with a force equivalent to that of an act of Congress."

To the same effect are *Gates v. Goodloe*, 101 U. S., 612, 619-621 (1879); *Lamar v. Micou*, 112 U. S., 452, 464 (1884); *United States v. Dietrich*, 126 Fed. Rep., 671, 674 (1908).

Also *Griswold v. Waddington*, 10 Johns. 438 (1819); *Abell v. Insurance Co.*, 18 W. Va., 406, 438 (1881); *Moore's International Law Digest*, volume 10, page 244.

We will now consider briefly the contract as tested by the law affecting contracts that involve intercourse with an enemy.

II

The Court will look at the things contemplated by the contract and the rights and options of the parties as provided in the contract *and not to any one isolated provision or fact*. It was not a mere debt that was created by the contract. Many things had to be done before the final liquidation of the amounts to become due under the contract. The performance of the contract was not to be suspended during the war. To carry out during the war any part of the contract would necessarily involve *commercial* intercourse with the enemy and would be illegal.

Among other things, the contract contemplated the payment of the purchase price by the New York company in annual payments of one-fifth of the purchase price measured by the book value of the stock plus dividends.

Any such payment would be illegal during the war. The first instalment was payable February 20, 1918. To have made that payment would have been clearly illegal.

The second instalment would be payable February 20, 1919. To make that payment would involve commercial intercourse with the enemy and would of course be illegal.

The third instalment would have become due February 20, 1920, and, though it would *now* be legal to make that third payment, this anomalous situation would be presented: that the first two payments would have been illegal, that to have made them would have been a crime, and hence that the contract itself was illegal and was void and abrogated upon the outbreak of war on April 6, 1917. So the third payment of February 20, 1920 never could become due. The fact that on February 20, 1920 it was permissible to remit money to Germany is immaterial. If it

be argued that the first and second payments payable February 20, 1918 and February 20, 1919 were suspended, the answer is: that the contract did *not* provide that *any* of its terms should be suspended during the war. If it had attempted so to provide, it would have been wholly illegal *on that ground alone*, and would have become void and dissolved on the outbreak of war, as is demonstrated in the two great English cases, *the Zinc case* and *the Rio Tinto case*, which are considered in the appendix.

The contract contemplated the delivery by the Leipzig company of certificates for one-fifth of the stock to the New York company on each annual payment. Those deliveries on or after February 20, 1918 and on or after February 20, 1919, following the assumed illegal payments by the New York company to the Leipzig company, would have involved *commercial* intercourse with the enemy and would be illegal.

The contract provided that, in the event that any of the annual instalments should not be paid when due, the Leipzig company should notify the New York company *in writing* that it required the payment of the instalment then due. Such a notification would involve *commercial* intercourse with the enemy and would be illegal.

The contract contemplated that in the event that the New York company should not within sixty days after such a demand pay the instalments so demanded, then the shares of stock, or any remaining balance of those shares, should be forthwith "*retransferred*" to the Leipzig corporation upon the books of the Botany. Such a transfer would involve *commercial* intercourse with the enemy and would be illegal.

Both of those provisions involved the exercise of rights by the German company. *Options* were given to the German company which rendered the whole agreement unlawful.

The measure of the purchase price was to be "the book value of such shares as shown by the books of the Botany Worsted Mills." That would involve *commercial* intercourse with the enemy. The giving of notice was involved in the fixing of the purchase price, if it were an honest

contract. It would be illegal for the New York company to give such notice during the war. The giving of such notice would constitute *commercial* intercourse. On the other hand, the giving of notice by the Leipzig company to the New York company would be the exercise of a right given to the Leipzig company by the contract and would be illegal.

The contract provided, article second, subdivision (c) that in arriving at the amount of each instalment for each of said years "the net worth of the hard assets of the Botany Worsted Mills, after deducting the total liabilities, shall be taken as the basis of the computation of the value per share and no allowance or increase shall be made on such instalment for good will." That also would involve the adjustment of accounts and would, if the contract were an honest and *bona fide* contract, involve *commercial* intercourse with the enemy and would be illegal.

Article fourth provided that "the New York company shall have the right at any time to require the deposit of the entire shares of stock or any balance thereof remaining in the hands of the Leipzig company, with a bank or trust company to be selected by the Leipzig company, such deposit to be made with such bank or trust company in escrow, to be held until the purchase price or the balance remaining unpaid shall have been fully paid, or (in case of nonpayment of any instalment) until the Leipzig company shall be entitled to such stock under the provisions of paragraph fifth of this agreement."

That also would involve the exercise of a right by the New York company, and also the exercise of a right by the Leipzig company, the giving of notice *by* the New York company *to* the Leipzig company and the giving of notice *by* the Leipzig company *or* the bank *or* trust company selected and approved *by* the Leipzig company *to* the New York company. The giving of any such notice would of course be *commercial* intercourse during the war and would be illegal.

No certificate was given even by wireless *by* a director resident in Leipzig regarding the transfer of the shares to the New York company *to* the treasurer of the Botany in

Passaic as required by the by-laws. No "advice", of course, was sent, even by wireless, by the treasurer in Passaic to the director in Leipzig, as required by the by-laws. The giving of such a certificate after April 6, 1917 would, of course, involve commercial intercourse and would have been illegal.

In view of the undisputed fact that the Leipzig company *never knew* of the contract and, of course, never authorized it up to April 6, 1917, the receipt of such a certificate *after* the war and the giving of the "advice" by the treasurer of the Botany in Passaic to the director in Leipzig, which were two vital things to be done to comply with the express requirements of the by-laws, and which remained unperformed on April 6, 1917, would, if done *after* April 6, 1917, have involved *commercial* intercourse with the enemy and on that day became illegal and if done *after* the enactment of *The Trading with the Enemy Act* would have been a punishable crime.

On the face of the contract, the result of preserving intact for the New York company and for the Leipzig company, as the contract attempted to do, all the rights to the 14,900 shares and to the payment of the purchase price thereof to the Leipzig company, would be to protect the Leipzig company's trade during the war and would enable the Leipzig company, upon the conclusion of peace, to obtain payment from the New York corporation. Or else, to uphold the contract would enable the parties to carry out the secret intention to return the stock to the Leipzig company when it was thought safe to do so. On either aspect to sustain the contract would diminish the effect of war on the commercial trade of the enemy country which it was the object of the United States during the war to destroy.

To recognize the contract and to give effect to it, by holding that it remained legally binding upon the contracting parties but that it was merely suspended, as contended by counsel for the appellant (in point IV of his brief, page 78) and that it defeated the right of capture by the United States, would be to defeat the great principles of public

policy adopted by the United States in *The Trading with the Enemy Act* for the purpose of crippling the trade and commerce of the common enemy.

The contract was one which could not be performed during the war. As was said by Bray, J. in the *Zinc* case: "If the performance of any term of the agreement or the exercise of any right or option given by it be rendered unlawful, the whole agreement is dissolved. The court cannot substitute for the agreement made by the parties any agreement minus any one of its terms. The parties have never so agreed." (1916) 1 K.B. 541, 548.

If the exercise of options as contemplated by the contract, the giving of notices, the forfeiture of rights, the delivery of shares, the fixing of the purchase price and the payment of the purchase price all became illegal April 6, 1917, then the Court cannot "substitute for the agreement made by the parties an agreement minus any one of its terms."

It cannot be contended, as it was in the *Zinc* case, that the parties intended that the operation of the contract should be *suspended during the war*. The contract was made in express view of the war. It bears on its face the demonstration of the *intention of the parties*. The Heyn and Stoehr letters remove all doubt on that subject. And yet, though it was made upon the eve of war and with direct relation to war, the parties did *not* provide that the rights should be suspended during the war. That feature of the *Zinc* case is not in this case. Hence the parties expressly intended and provided for certain things to be *done during the war*. Inasmuch as there was no provision in the contract providing for the suspension of rights or the suspension of any parts of the contract or the suspension of the contract as a whole during the war, the principle applies that as the performance of the contract during the war would have involved *commercial* intercourse with the enemy, upon the outbreak of the war it became illegal and was dissolved.

What results from that? The result is that the ownership, the beneficial interest, and the legal title to the shares were in the Leipzig company on April

6, 1917 and remained there until *The Trading with the Enemy Act* was passed and until, under that *Act*, the rights of the Leipzig company as an alien enemy and its ownership of, and beneficial interest in, those shares were demanded and seized by the Alien Property Custodian and so passed to the government of the United States.

The dissolution of the contract by war was specially pleaded by all the defendants.

III

Assuming that an equitable right had passed to the New York company, what was the effect of dissolution of the contract on outbreak of war?

In Point I of his brief (pages 16-17) counsel for the appellant, referring to the transfer of the shares on the books of the Botany company, said: "Irrespective as to whether or not these acts vested in the New York company *the legal title*, it certainly conferred upon it the equitable title." In Point IV (page 77) he refers to "*the executed contract*". On page 78 he tries to distinguish the *Zinc Case* and the *Rio Tinto Case* by the argument that in both of those cases the contracts were executory, and then, implying that in the case at bar the title had passed, he says: "In neither of them was the question presented as to whether the *title to property had passed* from the vendor to a vendee not an enemy or the ally of an enemy."

Again in Point IV (page 77) he argues that the "*debt* of the New York company to the Leipzig company was subject to capture and seizure". As there was no delivery of the stock, there never became any *debt* to capture or seize. There could not on any theory be any *debt* until there was a demand for the payments, and the New York company was not required to pay except upon a delivery of the certificates.

His further statement (page 78) that "consequently the performance of the obligation to pay was suspended", is disingenuous, for there was no "obligation to pay" upon

the New York company from the beginning to the end of the contract. In other words, *there was no debt*.

But further in Point IV of his brief (page 81), apparently forgetful of the concession that he had made in Point I, (pages 16-17), counsel for the appellant boldly states: "In the present case the *title* to the 14,900 shares of stock of the Botany Worsted Mills *passed at once* from the Leipzig company to the New York company on February 20, 1917." He then argues that the "payments *to be made*" by the New York company "could of course not be made while the war was pending", to the Leipzig company. He then argues that "the *debt* for the purchase price * * * came into existence concurrently *with the passing of title*".

That is a complete perversion of the terms of the contract. No *debt* came into existence on February 20, 1917. There was *then* no *present obligation* assumed by the New York company to make any present payment. That there was no debt appears all over the contract, but it is shown conclusively by the one fact alone that there cannot be a debt without a fixed or liquidated amount, and there was no amount fixed in the contract but only a method of computing an amount in the future.

In Point IV (page 82) counsel for the appellant further says: "It would be most extraordinary if the appellees' contention should be sustained, namely, *that although title to property may have passed, before the declaration of war*, to an American corporation or to an American citizen from a German subject, that title would be divested if the vendee was not called upon by the terms of the contract to make payment in whole or in part prior to the declaration of war."

The appellees do *not* contend or admit that "*title to the property passed*".

The appellees do *not* claim that title "would be divested".

If by the words "title to the property passed" counsel meant to refer to "beneficial ownership," then the answer is that no beneficial ownership or equitable title or right passed to the New York company. But even assuming, which is not conceded, that a beneficial title, right or in-

terest did pass to the New York company, then the contract was so far executory and necessarily involved such commercial intercourse with the enemy during the war, that it was dissolved and abrogated on the outbreak of war.

There was no transfer of the legal title. As the by-laws were not complied with, as there was no assignment from the two Stoehrs who were the trustees of the 14,900 shares, as there were no transfers executed by them, no part of the contract became executed. But even if it be conceded that there would have been, had there been an intent to contract and authority to contract, a transfer of *beneficial interest* under the contract, that would leave so many executory features of the contract to perform, that would necessarily involve such commercial intercourse with the enemy, that the contract would be voided and dissolved upon the happening of war.

IV

The entire argument of counsel for the appellant in Points I and IV of his brief, based upon a theory of "equitable title", is fallacious. A contract either conveys legal title or it does not. If the intention of the parties is to make a conveyance in the future, then no legal title presently passes. What the promisee gets is a *right* to a title in the future which may be the basis for a decree of specific performance. But he gets no *equitable title* in the true sense of these words. He gets an equitable *right*, a *right enforceable in equity*, by specific performance for example, but he gets no *equitable title* in the proper sense of these words. While it is true that in the sales cases the Courts frequently, but, we submit, loosely, use the words "equitable title", where they hold that there was an intention to transfer the legal title, but where that intention was not carried out, the correct statement of the principle would seem to be that such a promisee gets an equitable *right* to the legal title, a *right enforceable in equity*, if no superior legal rights, acquired in good faith, intervene.

Some of the authorities use the words "equitable *interest*" in reference to transfers of stock, but again the correct phrase is "equitable *right*." In cases of shares of stock, the equitable right is a right, "coupled with an irrevocable power to acquire the *legal* title". As stated by Professor Ames (Volume II, *Cases on Bills and Notes*, 784): "This view avoids the objection of disregarding the language of the statute prescribing the mode of transfer and also explains the decisions in *Redfern vs. Ferrier*, 1 Dow, 50, and *Dodds v. Hills*, 2 H. & M. 424, where a purchaser for value from a trustee of stock without notice of the trust was allowed to retain the stock, although before registration he learned of the trust."

Hence, in the proper meaning of the phrase, no "equitable title" vested in the New York company. The New York company having only such an equitable *right* (assuming such a right for the purpose of the argument), that *right* was only a right in the nature of a *contract right*, was purely executory, and to turn it into a legal title would necessarily involve commercial intercourse with the enemy, and hence that *right*, if any existed, was abrogated and rendered null and void on the outbreak of war.

We have shown that there never was any legal title in the New York company. The physical entry of the shares on the books of the Botany in the name of the New York Company was in no sense a vesting of the legal title in that company. Hence the Alien Property Custodian had a perfect right, in the exercise of his powers, to demand that the shares on the books of the company be transferred to him, which he did and which was done.

V

At the beginning of point IV of his brief counsel for appellant argued that "the status of the property is precisely the same as it would have been had it been a parcel of real estate located in New Jersey and conveyed by the Leipzig company to the New York company subject to a lien for unpaid purchase money in favor of the Leipzig company or to a mortgage to secure the unpaid purchase

price". He then again refers to "*the executed contract under which it acquired its title*".

The reference to an absolute debt secured by a real estate mortgage is quite fallacious. It needs no argument to show that an obligation on a real estate mortgage is an absolute debt. As to absolute debts, where the full title had passed, where the full consideration had been received, where nothing further remained to be done, where the result of a financial transaction was a debt and nothing but a debt, it may be that such an absolute debt would not be abrogated and that it would, but for the provisions of *The Trading with the Enemy Act*, under the old decisions, be suspended during the war. But such a debt could be captured under the provisions of the *Act* and the absolute unconditional amounts due to the enemy would be payable to the Alien Property Custodian.

In the summary of his point IV (page 77) counsel for the appellant states that the shares of stock "were to be redelivered from time to time as the instalments of the purchase price *were paid*". But that very statement, in the very headnote of said point, contradicts his argument in that point that the obligation of the New York company was the same as "a liability on a promissory note for goods sold and delivered" (page 82). The "goods" in this case, assuming that they were "sold", which was not the fact, were certainly "not delivered". There were elaborate provisions for the future delivery of the shares on the one side and the payment therefor on the other, constituting such a contract as inevitably required commercial intercourse with the enemy. Such a contract, under the doctrine of the *Zinc Case* and the *Rio Tinto Case*, became totally abrogated and void on the outbreak of war.

Counsel for the appellant has misconstrued the effect of those two great English cases.

At pages 79-80 of his brief he quotes from the opinion of Lord Justice Swinfen Eady the following:

"The contract of 1910 not only provided that the defendant shall purchase the plaintiff's whole production, but it also stipulates that the plaintiff shall not sell their

concentrates to any other person. *This negative stipulation remains in force according to the tenor of the agreement as well during a war as during a temporary strike or accident or breakdown of machinery*".

But he omits to state that in making those statements the Lord Justice was merely summarizing *the tenor of the agreement*, and that on the very next page he held (1916, 1 K. B. 558-559) that:

"To recognize such a contract during war and to give effect to it by holding that it remained legally binding upon the contracting parties would be to defeat the object of this country in crippling the commerce of the enemy. * * * I am of the opinion that the contract in question became dissolved on the outbreak of war and that the judgment below was right, and that this appeal fails".

The statement in appellant's brief (page 78) that the performance of the obligation to pay was suspended, begs the entire question. The obligation to pay was not such a debt as is suspended during war.

POINT VI

The seizure of the 14,900 shares under the provisions of The Trading with the Enemy Act was not in violation of the due process provisions of the constitution

In Point VI of his brief (pages 95-101) counsel for the appellant argues that the act of the Alien Property Custodian in seizing the shares "*ex parte* and without a legal proceeding based upon notice and a hearing or an opportunity to be heard in court" to the New York company, was null and void and "in violation of the due process of the Federal constitution".

The first obvious fallacy in the plaintiff's argument is that it *assumes* that the title to the shares was in the New York company. The Court below having held that no title or right passed to the New York company, it followed that the New York company had been deprived of no title or rights by the seizure and so the bill was dismissed on the merits. If this Court shall affirm the judgment entered

upon the decision of the Court below, on the ground that no title or right vested in the New York company or that the contract was abrogated and became void on the happening of war, the New York company will have been deprived of no constitutional right by the seizure of the Alien Property Custodian. If, on the other hand, this Court should reverse the judgment, the decree will be, pursuant to Section 9 of the Act, for the return of the property to the New York company.

In his supplemental bill the plaintiff claims under Section 9. But in the main bill the plaintiff pleaded the unconstitutionality of the Act. The plaintiff therefore has no standing unless it be under Section 9 or unless the Act be unconstitutional.

The first cases cited by counsel for the plaintiff are *McVeigh v. U. S.*, 11 Wallace 259, *Windsor v. McVeigh*, 93 U. S. 274, and other cases. Those cases do not sustain the appellant's contention. They arose under the Civil War confiscation acts. Those cases and the cases of *Risley v. Phoenix Bank*, 83 N. Y. 318, and *Chapman v. Phoenix Bank*, 85 N. Y. 437, and the other cases referred to on page 96 of counsel's brief, are not in point. They held merely that unless the Act was complied with the seizure was illegal. The point is well brought out in the opinion of Judge Hand in the case at bar, where he held that the Civil War confiscation cases "were not pertinent", and said:

"They arose under the Civil War Confiscation Acts which did not forfeit the property of all Confederates by virtue of their status, but of only six specified cases. There was no way for a claimant, even though an avowed Confederate, to prove that he was not within those classes except by appearance in the suit. To strike out his appearance *in limine*, on the ground that he was an enemy, as was done, was therefore to deny him the legal procedure accorded him by the statute. Section nine is the precise equivalent of this right, at least so far as concerns claimant friends, who are alone concerned here. The sole basis for the plaintiff's claim of unconstitutionality comes down, therefore, to the Custodian's power of initial sequestration

ex parte. But how does this differ in substance from the customary right upon libels of information *in rem* to arrest whatever property officials may decide to be forfeit? Such property may not be reclaimed *pendente lite* by filing a bond; the claimant must endure the temporary loss of possession until the innocence of the *res* is adjudicated. The public purpose of the statute so far overrides this incident of his rights of property. How much more is this the case in time of war where the interests are vital? The difference is one merely of procedure, the substantial rights are the same, for capture effects no more than an arrest *in rem*. The right to sell is the only addition and I have shown that this is at least subject to the judicial control in the event of a bill filed under Section Nine. The act therefore affords a complete remedy to all claimant friends, and is constitutional. As to claimant enemies, I have already considered its validity in *Kahn v. Garvan*, 263 Fed. R. 909, but the point does not arise here" (page 311; folios 534-535).

The argument of the complainant that the Act is in violation of the fifth amendment is conclusively disposed of in *Miller v. United States*, 11 Wallace 268, 304-305.

In that great case it was held, and the decision remains law today—unchanged in any respect—that legislation respecting the capture of enemy property on land is a legitimate exercise of the *war powers of Congress under the constitutional provisions conferring upon Congress the power to make rules respecting captures on land and water*, and AS SUCH IS NOT SUBJECT TO THE RESTRICTIONS OF THE FIFTH AMENDMENT TO THE CONSTITUTION.

In that case this Court said:

"It remains to consider the objection urged on behalf of the plaintiff in error that the acts of Congress under which these proceedings to confiscate the stock have been taken are not warranted by the constitution, and that they are in conflict with some of its provisions. The objection starts with the assumption that the purpose of the acts was to punish offences against the sovereignty of the United States, and that they are *merely statutes*

against crimes. If this were a correct assumption, if the act of 1861, and the fifth, sixth, and seventh sections of the act of July 17, 1862, were municipal regulations only, there would be force in the objection that Congress has disregarded the restrictions of the fifth and sixth amendments of the constitution. Those restrictions, so far as material to the argument, are, that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury; *that no person shall be deprived of his property without due process of law*, and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. But if the assumption of the plaintiff in error is not well made, if the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States, **if, on the contrary, they are an exercise of the war powers of the government, it is clear they are not affected by the restrictions imposed by the fifth and sixth amendments."**

The Court then went on to state that

"It is sufficient that the right to confiscate the property of all public enemies is a conceded right",

and that legislation providing for the confiscation of enemy property wherever found is a proper exercise of the war powers of the government, and as such is not subject to the restrictions of the fifth amendment.

The *Miller case* was expressly affirmed in the case of *Tyler v. Defrees*, 11 Wallace, 331, and its authority has never been questioned.

In *Tyler v. Defrees* (*supra*) this Court said at page 346:

"Five or six cases arising under this statute were argued before us at the last term, and, appre-

ciating both the difficulty and the importance of some of the points raised in argument, they were all ordered to be argued again at this term, and have, under that order, been ably and fully reargued. They have all been disposed of but this, and the Court have not hesitated, where there was a substantial departure from the mode of proceeding directed by the statute, to reverse the decree of the Courts below in the cases which were here on error to those proceedings. AND WHEN WE HAVE FOUND THE PROCEEDINGS TO BE CONFORMABLE TO THE COURSE OF PROCEDURE OF REVENUE AND ADMIRALTY CASES, WE HAVE HELD THE DECREES TO BE VALID. The cases thus decided, and especially the case of *Miller v. United States*, in effect dispose of all the objections taken to the action of the Court in this case, even if that action were here for review directly, instead of being presented collaterally in another suit."

The *Miller case* is authority for the proposition that Congress has power to confer upon the President the right to decide in the first instance whether the property is enemy property for the purpose of seizure.

The framers of the constitution knew the difference between capture and court process, even though counsel for the appellant pretends that the words are synonymous. The men who framed the constitution knew what war meant. THEIR OBVIOUS PURPOSE IN GRANTING CONGRESS THOSE POWERS WAS TO ENABLE CONGRESS TO WAGE WAR, UNHAMPERED IN ITS WAR POWERS BY ANY RESTRICTIONS ON THE POWER OF A SOVEREIGN STATE, AGAINST COUNTRIES WHOSE SOVEREIGN POWERS WERE NOT LIMITED BY ANY WRITTEN CONSTITUTION.

This Court has even held that an undoubted citizen of the United States can be excluded from this country by the decision of an administrative officer that he is not a citizen of the United States, and the determination of that administrative officer is conclusive upon all the Courts of the land (*United States v. Ju Toy*, 198 U. S., 253).

The *Miller case* (*supra*) upheld the constitutionality of the civil war confiscation acts and decided, among other things:

(a) That the seizure of the stocks in that case was properly made by giving notice of seizure to the president or vice-president of the railroad company, and that a seizure thus made by the marshal in obedience to a warrant and monition was sufficient to give the District Court jurisdiction.

(b) That stocks and credits were attachable in admiralty (the confiscation acts providing that the determination of contested questions should follow as nearly as possible the procedure in admiralty cases) by means of the service of a notice without the aid of any statute.

(c) That the confiscation acts of August 6, 1861, and July 17, 1862, were constitutional, and that, with the exception of the first four sections of the later act, they were an exercise of the war powers of the government, and were not an exercise of its municipal power; hence they were not in conflict with the restrictions of either the fifth or sixth amendment of the constitution.

In the *Miller case* this Court also said at page 306:

"The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, WHILE AT THE SAME TIME IT FURNISHES TO THAT GOVERNMENT MEANS FOR CARRYING ON THE WAR. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation. * * * Confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership."

In *Brown v. United States*, 8 Cranch. 110, it was held that the exercise of the right of capture and confiscation and the agencies employed in such capture and confiscation, and the extent of capture and confiscation, rested entirely with the sovereign, and was a matter of internal policy, and that under the constitution of the United States the power to determine those great questions of policy and "to make rules respecting captures on land and water" is vested in the Congress of the United States.

In the civil war confiscation acts it was provided that there should first be a provisional seizure and then a judicial determination, following the procedure in admiralty cases as near as might be, as to the title of the seized property. Under the confiscation acts, the property was first seized by the President and was thereafter condemned and sold as enemy property, the seizure being first made by the marshal of the district, who made a return to the district attorney.

Under the present act all property which the President, after investigation, shall determine belongs to an enemy, shall be conveyed and transferred to the Alien Property Custodian (section 7(c)). Section 12 of the act, as amended, provides that the Alien Property Custodian shall be vested with all the powers of a common law trustee in respect of all property "which shall come into his possession in pursuance of the provisions of this act", and shall in respect thereof have all the rights of an owner, including the power of sale.

There are other differences, but that distinction between the confiscation acts and the present act disposes of the cases decided after the civil war holding that the title to property did not pass unless the judicial procedure in admiralty cases had been substantially followed.

The cases above relied upon by the complainant merely held that the procedure provided in the confiscation acts must be carried out.

The present act differs from the civil war confiscation acts in that those acts provided for a judicial hearing prior to the sale. The present act provides for seizure by the Alien Property Custodian after investigation by him,

and his act is the act of the President. A person claiming to be aggrieved by any seizure is given the express right under the provisions of section 9, to file notices of claim. If the claim is denied by the Alien Property Custodian, the claimant is entitled, under section 9, to bring suit in equity to establish his right, title or interest in or to the property seized.

It will thus be seen that the rights of any claimant to property seized by the Alien Property Custodian are determined, not in condemnation proceedings, as under the confiscation acts, but by a claim made or filed and suit brought under section 9 of the act, after the Alien Property Custodian has obtained title by his seizure.

While the *Miller* case is authority, which has never been overruled or questioned, for the doctrine that the confiscation acts (and, as we contend, *The Trading with the Enemy Act*) were not in conflict with either the fifth or sixth amendments of the constitution, the provisions of section 9 of the present act fully provide for *due process of law in the full sense guaranteed by the fifth amendment to the constitution*.

Section 9 was carefully framed to safeguard all the rights of any claimant to seized property, and provides for a statutory injunction until "final judgment or decree" either in favor of the claimant, or "until final judgment or decree shall be entered against the claimant, or suit otherwise terminated". It expressly provides for the making of claims to any property seized. The time to file claims is not limited, but there is a limitation upon the time to bring suit following the claim, for section 9 provides that "said claimant may, at any time before the expiration of six months" after the end of war, institute a suit in equity in the district court of the United States to establish the "interest, right, title or debt so claimed".

Counsel for the appellant quotes at length from the decision of District Judge Mayer in the case of *American Exchange Bank v. Palmer*, 256 Fed. Rep. 680, 683 (1919). The precise question decided by Judge Mayer in that case was whether a bank deposit was "property" within the meaning of Section 7(c) of the Act. The precise pro-

visions of Section 7(c) before the Court in that case were these: "Any money or other property . . . held by, on account of, or on behalf of, or for the benefit of, an enemy". The bill in that suit was an independent bill by the bank to interplead the Alien Property Custodian and an American citizen claiming to be the owner of the deposit which was the subject of the suit. As a matter of statutory construction we respectfully submit that Judge Mayer's opinion, holding that a bank deposit was not "property" within the meaning of the Act, was wrong. But while Judge Mayer there held that a debt such as the bank there owed was not "property" within the meaning of the Act, he did say that the word "property" as used in the Act "undoubtedly refers to a tangible res, or some evidence of debt, or share in property such, perhaps, as, on the one hand, a note or bill of exchange, and on the other hand, a certificate of stock or an undivided interest in real property". The point involved and decided in that case is not involved in the case at bar.

Judge Mayer there used the illustration of citizen A making and delivering his note to enemy B, but insisting that there is a defense to the note, and that he did not owe the sum represented by the note and was not liable upon the note, and he asked, without deciding, whether the Custodian could determine, without a hearing, that there was liability from citizen A to enemy B upon the note, and "therefore that there was either money or property owing from citizen A to enemy B". He intimated that the Custodian could not make such determination without a hearing. But the language used by him was a mere *dictum*, insofar as it intimated such a limitation upon the power of the Alien Property Custodian. That language must be taken to be overruled by the decision of the Circuit Court of Appeals, Second Circuit, in *Garra v. \$20,000 bonds*, 265 Fed. Rep. 477. In that case the Court, in holding that the Alien Property Custodian might properly under Section 7(c) of the Act apply to a District Court for aid in obtaining possession of property to which he was entitled under the Act, said:

"The trustees claimants contend that the Alien Property Custodian can seize only property belonging wholly to alien enemies; that he stands in their shoes and can get no more than they could themselves. On the other hand the Alien Property Custodian contends that, the President, having delegated his authority to him under Section 5 of the Act, HE CAN CONCLUSIVELY DETERMINE WHAT PROPERTY IS LIABLE TO SEIZURE AS BEING THAT OF AN ALIEN ENEMY.

We agree with the Alien Property Custodian and cannot read the perfectly plain language of section 7(c) in any other way. As all the facts were known and undisputed, they amounted to an investigation by the Alien Property Custodian. If persons not alien enemies, or allies of alien enemies, were given no means to protect their interests in such property the seizure would be unconstitutional as without due process of law; but they are given such remedies under section 9".

And again at page 480:

"It is obviously of the utmost importance that in time of war enemy property should be put into the possession of government; on the other hand, no great harm can come to the interests of innocent persons since the possession and management of the property by the Alien Property Custodian is under the control of the President by regulation and of the Courts by decree".

In the case of *Watts v. Unione Austriaica*, 248 U. S. 9, cited on page 97 of appellant's brief, a libel *in personam* was brought by a British corporation against an Austro-Hungarian corporation in the United States District Court. The Court held that the respondent, though an alien enemy, was entitled to defend, but that in view of the provisions of the Act, and the fact that intercourse between the residents of the United States and the residents of Austria-Hungary was physically impossible, further prosecution

should be suspended until adequate presentation of the respondent's defense should become possible.

That was a private litigation between two ali ns, one friendly and one enemy, and no question was involved of the war powers of the United States or of enemy property.

The long quotation from the decision of this Court in *Coe v. Armour Fertilizer Works*, 237 U. S. 413 merely states familiar principles about due process of law, and has no relation whatever to the war powers of the United States.

POINT VII

The argument in appellant's Point V that because Stoehr & Sons Inc. was an American corporation the Alien Property Custodian was without jurisdiction to seize the 14,900 shares is unsound

Appellant's point V is made up of two sentences. The first is: "Stoehr & Sons Inc., *the owner of these shares*, being an American corporation, was not an enemy or ally of an enemy within the meaning of *The Trading with the Enemy Act*". There are two assertions in that sentence. The first, that Stoehr & Sons Inc. was "the owner of the shares", begs the primary question at issue. As we have said, if the New York company be held to be "the owner of the shares", then it follows that it will be entitled to the return of the shares. If it be held that it is not the owner of the shares, then it has no standing to question the legality or validity of the seizure, or indeed any of the acts of the Alien Property Custodian.

The second assertion in that sentence that "being an American corporation", it "was not an enemy or ally of an enemy within the meaning of *The Trading with the Enemy Act*", is obvious under the terms of the Act itself, and has never been disputed. His statement on page 91 that the New York company having been incorporated under the laws of New York does not come within the term

"enemy" as defined in the *Act*, is again an assertion of the obvious and is not disputed.

The second sentence in appellant's point V is: "Consequently these shares of stock were not subject to capture or seizure under its terms, and the act of the Alien Property Custodian in condemning them as enemy-owned property, upon his determination that they were such, was without jurisdiction and void".

Point V of the appellant's brief is in part devoted to an *interpretation* of the *Act* and not to its constitutionality. In point VI, he argues that the *Act* is unconstitutional on the ground that it does not provide for a judicial determination before seizure. But in point V he argues that *under the terms of the Act itself*, the seizure was a nullity because the title or a claim to title was in the New York company.

He does not question that the Alien Property Custodian made a determination, after investigation, that the shares were enemy-owned. Our position is that the fact of such investigation not being disputed, there is no question, under the proper interpretation of the *Act*, as to the validity of the seizure.

He finally comes down to the assertion that under the terms of the *Act* the seizure of the shares claimed to belong to an American corporation, was "a nullity". But before reaching that point, he makes three other assertions or arguments which, for clearness sake, will be considered first.

(1) He begins his argument in point V by the assertion that in point II he has "shown that even the property of an enemy cannot be seized on land in the absence of an Act of Congress authorizing such seizure", and cites *Brown v. United States*. That case is cited at the bottom of page 41 of his brief and a three-page quotation from the opinion of Chief Justice Marshall is given on pages 42, 43 and 44 of his brief. The decision in that case, and in the five cases cited on page 45 of appellant's brief, establish the principle that the right to capture enemy property on land is dependent upon congressional authority. Had there been no Trading with the Enemy Act those

cases would be in point in the case at bar. In view of the enactment of the *Act* by Congress and of its terms, those cases have no point in the case at bar at all.

(2) Next counsel for the appellant states (pages 89-90): "Such an act is highly penal in its character. It is in derogation of the common law. It involves a forfeiture. It contravenes the humane and wise policy which seeks to mitigate the rigors of war and to exempt individuals from punishment for the wrongs committed by their government". For those assertions he cites *Cohen v. N. Y. Mutual Life Insurance Company*, 50 N. Y. 610, which was also cited on page 84 of his brief, and he quotes from the decision of this Court in the case of *Mrs. Alexander Cotton*, 2 Wallace 404, 419.

From those cases he argues that "such statute must be strictly construed against the government. The soundness of this doctrine is well illustrated by decisions under the Confiscation Acts of 1861 and 1862". But this Court did not in construing these acts establish any such rule of construction. It held that "where there was a substantial departure from the mode of proceeding directed by the statute", it would reverse the decision of the Court below. *Tyler v. DeFrees*, 11 Wallace 331.

The seven cases cited on pages 90 and 91 of appellant's brief, which construed those Confiscation Acts, held that the property sought to be condemned must fall within one of the six classes specified in the *Act*.

(3) On page 93 he argues that the fact that a majority of the stock of the New York company is owned by enemies or is represented by voting trust certificates belonging to enemies "does not convert the corporation into an enemy within the meaning of the statute" and that "the corporation is an independent legal entity and its character is not affected by the status of the owners of even a majority of its stock", and he cites six cases. It is a complete answer to that argument that the shares were seized not because a majority of the stock of the New York company represented by voting trust certificates belonged to alien enemies but because the contract gave no title to

the shares to the New York company. It is not claimed that the ownership of the majority of the stock of the New York company by enemy aliens makes the New York company an enemy within the meaning of the Act.

Then he makes three more assertions that lead up to his final assertion that the seizure of the Alien Property Custodian was a nullity. He says (page 91) that the Act is "expressly limited in its operations to the property of an enemy and ally of enemy". On page 92 he asserts: "No property other than that of an enemy or an ally of an enemy comes within the purview of this legislation". Again on page 94 he asserts: "It was not within his power to render such a decision and to adjudicate upon the rights of this New York corporation". And finally, at the bottom of page 94 and top of page 95, he asserts: "The Alien Property Custodian not having the power under the statute to seize property belonging to an American corporation, *his acts of seizing the 14,900 shares and of seeking to sell them are nullities*".

The fallacy in his argument is evident. According to his argument, the Alien Property Custodian could capture *only* such enemy property as was OPENLY, AVOWEDLY AND CONFESSEDLY ENEMY PROPERTY. If the Alien Property Custodian can capture *only such* property, it is self-evident that the right expressly conferred upon Congress by the Constitution "to make rules for the capture of property on land and sea" will be seriously, if not fatally, crippled.

The Trading with the Enemy Act was not so limited. While it is true that Section 7(c) provides that "any money or other property owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy", which "the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian", it is obvious upon a consideration of the entire *Act*, and in particular of Section 9, that the power of capture so conferred upon the President WAS NOT LIMITED TO OPENLY, AVOWEDLY AND CONFESSEDLY ENEMY PROPERTY.

The *Act* has elaborate provisions regarding CONFLICTING CLAIMS TO PROPERTY. Section 7(e) provides that "no person shall be held liable in any Court for or in respect to anything done or omitted in pursuance of any order, rule or regulation made by the President under the authority of this *Act*". That subdivision also provides: "Any payment, conveyance, transfer, assignment or delivery of money or property made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same". Section 9 provides: "That any person, not an enemy or ally of enemy, claiming any interest, right or title in any money or other property which may have been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian", may file with the Custodian a notice of claim; that the President may, "with the assent of the owner of said property and OF ALL PERSONS CLAIMING ANY RIGHT, TITLE OR INTEREST THEREIN, order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian".

Section 9 further provides that "If the President shall not so order within sixty days after the filing of such application", the claimant shall have the right, in a suit in equity in a District Court, "to establish the interest, right, title or debt so claimed, and if the suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right or title is asserted or debt claimed, shall be retained in the custody of the Alien Property Custodian" until "any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment or delivery" * * * or "until final judgment or decree shall be entered against the claimant or suit otherwise terminated".

It is obvious from those and other portions of the *Act* that the President was expressly clothed with power to seize property which "after investigation" he should determine was enemy property, whether it was nominally in the possession or control of, or whether the legal or equi-

table title to such property was in, an enemy or a citizen or friendly alien.

The appellant's contention is that because property is *claimed* to be the property of a citizen or friendly alien, the right of capture does not exist. In Point V he argues that the true construction of the *Act* is that "it was not within his power to render such a decision and to adjudicate upon the rights of this New York corporation".

But it does not follow that the act of the President "after investigation" in "determining" that the shares belonged to the Leipzig company, is without validity. Even assuming, as counsel for the appellant assumes, that the ownership of the shares was at the time of seizure vested in the New York company, either legally or equitably, the act of seizure thereof by the Alien Property Custodian was by no means "a mere nullity". The validity of the seizure by the Alien Property Custodian is, under the terms of the *Act*, by no means dependent upon the question whether it may or may not subsequently or ultimately be determined that the *res* is American owned. The validity of the seizure depends only upon the determination by the President, or by his delegated officer, "after investigation", that the property is owned by or held for, or on account of, or on behalf of, an enemy. That determination may be mistaken, but a mistake in such a determination does not invalidate the initial seizure or sequestration. A citizen, whether a person or a corporation, or a friendly alien, has his full remedy under Section 9, but until he obtains relief thereunder the seizure stands and is in all respects valid.

If the interpretation contended for by the appellant were the law, then the right of capture on land could easily be defeated. All that aliens in this country on the eve of war would need to do would be to make a nominal assignment, conveyance, transfer or delivery of their property or rights to a citizen or to a friendly alien, who would assert his "rights" in that property, and the United States would be powerless to capture or make use of the property except and until the final determination of judicial proceedings in a court of law. Such a nominal

assignment or transfer would be sufficient to paralyze and defeat the right of capture of property on land.

There is nothing in the *Act* to justify such an interpretation. On the contrary, the *Act* expressly gives the President power to determine enemy ownership "after investigation". And that power is not limited to property that is openly, avowedly and confessedly enemy property or to property only of which the legal title is openly in an enemy, but it relates to all property "owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy" (Section 7(c)). No clearer language could be used to invest the President with power to seize property which he shall have determined "after investigation" to be in fact enemy property, no matter how or by whom or under what claim held, whether by an alien enemy, an American citizen, an American corporation, or a friendly alien.

POINT VIII

The appellant's argument in his Point X that under the *Act* as amended there is no power of sale in the Alien Property Custodian except of perishable property and for the purpose of preventing waste, is contrary to the plain provisions of the *Act* as amended

He quotes the provisions of Section 12 of the *Act* as originally passed (page 123). On the next page, 124, he quotes the amendment of Section 12 of March 28, 1918. Then follows a quotation from the decision of Judge Mayer in the case of *American Exchange National Bank v. Palmer* (*supra*), which has nothing to do with the question of construction discussed in his point X. He then argues that in view of the fact that the Alien Property Custodian "is merely vested with the powers of a 'common-law trustee', it is believed that no substantial change has been wrought by this amendment in the provisions as originally enacted in Section 12 of *The Trading with the Enemy Act*. The Alien Property Custodian merely receives the property seized for preservation and safeguarding".

In Section 12 of the *Act* as originally passed there was a power of sale or other disposition "when necessary to prevent waste and protect such property".

Section 12 as amended March 28, 1918, retained the provision that the Alien Property Custodian should be "vested with the powers of a common-law trustee" in respect of seized property, but contained the following new provision: "and in addition thereto, * * * shall have power to manage such property and do any act or thing in respect thereof OR MAKE ANY DISPOSITION THEREOF OR ANY PART THEREOF, BY SALE OR OTHERWISE". That amendment eliminated from the *Act* the limitation in Section 12 as originally enacted of sales "if and when necessary to prevent waste and protect such property".

To argue, as counsel thus does, in the face of those two perfectly plain sections, that the amendment of March 28, 1918 wrought "no substantial change" in the *Act*, is to argue in the face of the clearest possible language of the statute to the contrary.

But in spite of that he repeats his statement that "the power of disposition would necessarily be confined to the sale of perishable property and for the purpose of preventing waste" (page 126). And he further argues that it would be "a manifest incongruity" if the Alien Property Custodian were held to have the right to dispose of any property coming into his possession "irrespective of the necessity for such disposition in order to prevent waste and deterioration".

The rest of appellant's point X is taken up with references to the business of the Botany Mills, its prosperity, its surplus, its condition, its prospects, the probability of a treaty with Germany, all leading to the assertion that "there is, therefore, no reason for the sale of these shares of stock at this time".

The answer to those statements is that those are questions of executive discretion which were not at issue in this suit and which will not be reviewed by this Court, the power of sale in the Alien Property Custodian being beyond argument in the very plain words of the *Act*.

In addition to the foregoing considerations, the appellant has no standing in this case to raise that question. If the appellant succeeds in his contention that the title to the shares was in the New York company, there will be no sale. In that case it would not be necessary for him to argue that the proposed sale would violate the intent of the *Act*, for the obvious reason that there would be no sale at all. The filing of his notice of claim and the bringing of this suit stayed the sale pending the trial of the suit and this appeal.

If, however, this Court shall decide that the shares were at the time of their seizure the property of the Leipzig company, then the appellant cannot complain of their sale, whether such sale is in conformity with the true intent and meaning of the *Act* or not.

Hence the argument that the proposed sale would violate "the true intent and meaning" of the *Act* cannot in any sense be in point upon this appeal.

POINT IX

The argument in appellant's point VIII that the limitation of relief upon a sale of property to the proceeds received therefrom violates the due process clause of the Constitution, is not involved in the case at bar

The appellant contends that the provisions of the amendment of November 4, 1918 are unconstitutional. That amendment provided, among other things, that the sole relief and remedy of a person having a claim to money or property conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian, "or required so to be, or seized by him, SHALL BE THAT PROVIDED BY THE TERMS OF THIS ACT", and in the event of sale "shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian".

The "remedy provided by the terms of this *Act*" referred to in the amendment of November 4, 1918, is that

contained in Section 9, under which the present suit is brought. The appellant fails to state that Section 9 provides that the power of sale given to the Alien Property Custodian by Section 12 is immediately and effectually stayed by the mere filing of a notice of claim, by a person who is a non-enemy, of title to or an interest in property or money seized by the Alien Property Custodian.

Such a claim was filed by the complainant in the present case. It is a complete answer to the appellant's entire argument in Point VIII to say that there can be no sale until the question of the title to the seized stock is adjudicated upon this appeal. If this Court should decide that the title in the shares was in the New York company, then the shares will be returned to the New York company, and there will be no sale. The appellant would then have no standing to complain of the terms of a sale that would never take place.

If, on the other hand, this Court should decide that the shares were the property of the Leipzig company, then neither the New York company nor the complainant herein as the holder of a voting trust certificate representing stock in the New York company would have any standing to complain either of the fact of the sale, the terms thereof, or the disposition of the proceeds.

We have shown that even if Congress in passing the Act and the amendments thereto had been bound by the restrictions of the Fifth and Sixth amendments, which it was not and is not, Sections 9 and 12 as amended provide for the due process of the law in the fullest sense of the word. The only person who could be aggrieved by the provision in the amendment of November 4, 1918, limiting the right of a claimant, in the case of sale, to the proceeds of the sale, would be an American or other non-enemy claimant. Such a person can obtain a complete judicial determination of his claim under the provisions of Section 9. Pending such a determination he can prevent any sale of the property claimed by him merely by filing a notice of claim as provided in the Act.

How completely and effectually the rights of American citizens and friendly aliens are protected under the provi-

sions of Section 9 is shown by the claim of the appellant under Section 9 and the present suit thereon.

The shares which are the subject of the suit were seized by the Alien Property Custodian on April 5, 1918. They were advertised by him for sale on December 2, 1918. They have not been sold and are still, after a period of more than two years, held by him subject to the judicial determination of the rights claimed therein by the appellant on behalf of the corporation in which he claims to be a stockholder. During that period the appellant has had a trial of his claim in the District Court and is now heard on appeal to this Court. Not until this Court has determined that the appellant's claim is unfounded in law and in fact may the shares be sold.

No more complete demonstration could be had of the ample protection afforded by the Act, and in particular by Section 9, of the rights of American citizens and of friendly aliens in and to property seized by the Custodian thereunder.

This case does not present the question stated in Point VIII (page 105) of appellant's brief of property in fact belonging to a citizen who either did not know of its seizure and hence made no claim to it, or stood by and allowed it to be seized and sold, being remitted to the proceeds only. THAT IS A QUESTION WHICH THIS COURT WILL ONLY PASS UPON WHEN IT IS INVOLVED IN A CAUSE PROPERLY BROUGHT BEFORE THE COURT.

At the risk of repetition, we feel compelled to state that in his Point VIII (page 105) counsel for the plaintiff repeats his statement, made elsewhere in his brief, that the Fifth Amendment to the Constitution of the United States "controls the exercise of the war power." The exact contrary was held by this Court in *Miller v. United States* (*supra*).

This Court, of course, will pay no attention to the insinuations, quite without foundation in fact, as to "limited competition" upon a sale of the shares, and as to the price that may be realized for the shares "being greatly less than their real value" (appellants' brief, page 104).

POINT X.

The questions of public policy as to the enactment and the scope of the Act, and the exercise of the discretion committed by the Act to the President, and under the Act by the President to the Alien Property Custodian, will not be reviewed by this Court

At various places in his brief (point V, top of page 90, at page 94 and again at page 41) counsel for the appellant argued that "there was nothing in our jurisprudence which contemplated that those shares of stock on the outbreak of war should be seized by the government". At that point he quoted three solid pages from the opinion of Chief Justice Marshall in *Brown v. United States*. Again, (in point VIII, page 104) he discussed questions of public policy and executive discretion, as to the time and terms of sale, such as to whether the property should be sold in bulk, as to the exclusion of aliens as bidders, as to the alleged lack of competitors in the bidding, and other questions of executive discretion and public policy pure and simple.

The answer to all of those arguments is that:

The policy of Congress in the respects referred to by counsel for the appellant will not be reviewed in this Court.

The questions of public policy passed upon and decided by Congress in passing the Act in the exercise of the war powers conferred upon Congress by the Constitution, the questions of public policy in the exercise by the President of the discretions conferred upon him by the Act, and the questions of policy and discretion passed upon by the Alien Property Custodian under the authority of the Act and under the proclamations and executive orders of the President, all present questions of public policy that will not be reviewed or made the basis of a decision by the Court in this cause.

Whether in the event of war the government of this country shall absolutely confiscate enemy property wherever found, whether it will merely hold such property in custody *in specie* until the end of the war, whether it will seize such property and sell the same, or a part thereof, and employ in the war or hold the proceeds and the unsold property until the end of the war, or whether it will make any seizure of any kind, are all questions to be determined by Congress, and its decision is final.

There can be no doubt of the power of Congress to make *absolute confiscation* and *a fortiori* to take any measures short of confiscation. This was settled in the case of *Brown v. United States*, 8 Cranch., 110, and has been repeatedly affirmed by this Court. In the *Brown* case this Court said, at page 121 :

"Respecting the power of government, no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will."

This doctrine was reaffirmed in the *Miller* case (*supra*).

POINT XI

The contention in point IX of appellant's brief that because the President **PERSONALLY** did not make the adjudication of the enemy ownership of the shares, the act of the Alien Property Custodian in seizing the shares was without jurisdiction and void, is unsound

Plaintiff's point IX again presents a question of the construction of the statute. He does not claim that the President did not *in fact* and *in terms* vest in the Alien Property Custodian the powers conferred upon him by Section 7(c). The President did that by various executive orders. Among the executive orders so vesting such powers was the executive order of October 12, 1917, paragraphs XXIX and XXXIII, which are printed in appellant's point IX, pages 111-112; and also by the executive order of February 26, 1918, quoted at pages 112-113 of the appellant's brief, and which need not be repeated here.

He raises no question as to the interpretation of the President's executive orders or their meaning or effect. But he asserts that the President could not under the *Act* delegate to the Alien Property Custodian the power to make *any* determination as to enemy ownership of property provided in Section 7(c).

His argument has two branches. The first is that Congress did not *in fact* provide for the delegation of that power by the President (page 120). The second is that the determination under Section 7(c) is a judicial act (page 118), and hence that Congress *could not* provide that the President could delegate such power (page 114).

Section 5(a) of the *Act* provides in *express terms* that the President "may make such rules and regulations not inconsistent with law, as may be necessary and proper to carry out the provisions of this Act; AND THE PRESIDENT MAY EXERCISE ANY POWER OR AUTHORITY CONFERRED BY

THIS ACT THROUGH SUCH OFFICER OR OFFICERS AS HE SHALL DIRECT”.

Notwithstanding that clear and comprehensive provision counsel for the appellant argues (page 120) that “this is not a grant of power to the President to delegate his functions”.

He quotes the provisions of Section 7(c) (pages 109-110), the provisions of Section 9 as amended July 11, 1919 and various executive orders (pages 111-113). But he could have gone through the *Act* as amended and have pointed out hundreds of things or powers or discretions that were conferred upon the President by the *Act*. If the President may not “exercise any power conferred by this Act through such officer or officers as he shall direct”, then every power, every discretion, every determination committed to the President by the *Act must be exercised by the President personally*.

Such a construction of the *Act* would be an absurdity. It would make the exercise of the war power of capture of enemy property on land abortive. To say that Congress intended to require that the President, who is the commander-in-chief of the army and navy of the United States, should do all the things, make all the determinations, exercise all the discretions, grant and revoke all the licenses, make all the investigations and do all the other things contemplated by the *Act*, is putting a construction on the *Act* which is absurd on the face of it. When Congress provided that the President “may exercise any power” conferred by the *Act* “through such officer or officers as he shall direct”, it meant ANY and ALL such power. It did not mean that the President might delegate to the Alien Property Custodian power to seize and take possession of property but could not delegate power to investigate title to property.

He argues (page 122) that if the Alien Property Custodian had the power to make the determination provided by the *Act* and also to seize the property, he would thus be made “not only the investigator and the judge but also the executioner”, and “that such a situation would be contrary

to the first elements of propriety and justice". If that argument is sound, then it would apply to the President acting under the *Act* with more force than to the Alien Property Custodian.

Section 7(c) provides that if (a) the President "after investigation, shall determine" that the property is enemy-owned, (b) the President shall require the property to be turned over to the Alien Property Custodian. The same Section 7(c) also *in terms* empowers the President "to make investigation", and also *to require* that the property shall be turned over to the Alien Property Custodian.

According to the argument of counsel for the appellant, the President would, if he exercised both of the powers of Section 7(c), be "not only the investigator and the judge but also the executioner", and the Alien Property Custodian would be only the custodian of the property directed by the President to be turned over to him.

According to the argument of counsel for the appellant, the President would be compelled to make not merely (a) the investigation but also (b) the direction to turn the property over and (c) he apparently would have to sign the writ addressed to the holder of the property commanding him to turn over the property to the Custodian. The Custodian would apparently, upon the appellant's theory, be a mere passive recipient of the property. Such a construction of the *Act* is a palpable absurdity.

The reference made by counsel for the appellant to the Alien Property Custodian or the President being the "investigator and the judge and also the executioner" is not a candid statement of the intent of Congress. As this Court has pointed out again and again (in *Miller v. United States* and other cases) the seizure of enemy or alleged enemy property is not a criminal proceeding, but is an exercise of the war powers of Congress. Therefore arguments from the criminal law have no application.

In support of his argument (page 120) that Section 5(a) "is not a grant of power to the President to delegate his functions", counsel for the appellant argues that "it is *his exercise* of power or authority to which reference

is made. Upon *him* rests the responsibility for any action taken. *He* is merely permitted to call into requisition *to enable him to exercise his* power and authority such officer or officers as *he* shall direct. It is *he* who acts 'through such officer or officers'. But nevertheless it is *he who is to act*".

If those words mean anything they mean that the President *must* exercise *all* of the powers and that in exercising his powers he is permitted only "to call into requisition" such "officer or officers as he shall direct" *to assist him*. It means, if it means anything, that not only must all of the powers be exercised in the President's name, but that the initiative as well as the final determination and seizure, the sale and all the subsequent and connected acts, must come from the President, must be done in his name, must be done by him with the assistance merely of such "officer or officers as he shall direct". Such a construction of the Act is an absurdity.

Congress has given the power to the President to delegate "ANY power conferred by the Act" upon him to "such officer or officers as he shall direct". That includes the power to make the investigation under Section 7(c).

This leads to the second part of the appellant's argument, namely, that even if Congress had intended that the President should have the power to delegate his powers under the Act, Congress could not legally so provide.

His statements under this point are very confused and confusing.

He does not argue that it would be unconstitutional for Congress *expressly* to provide that the President's power of investigation and determination could be delegated. No constitutional question is raised by him in point IX. Yet he says that "the *nature* of the duties" imposed upon the President is such that "*they cannot be delegated*" (page 114). By that he may mean that the nature of the duties *imposed by the Act itself* upon the President is such that they cannot be delegated. But that does not present a question of statutory construction nor of constitutional law, but a difference of opinion between

counsel for the appellant and Congress as to what powers the President is to exercise personally and what powers he may delegate.

The same vagueness characterizes his next sentence, "functions expressly imposed upon him *cannot be performed by another*". The answer is that Congress thought otherwise and so provided. Or arguing thus, he may mean that Congress *could not* provide that the President should delegate his powers. If Congress cannot so provide, then it must be because the constitution forbids. That he does not claim.

Before he reaches the assertion in his brief (page 120) that Congress *in fact* did not provide for a delegation of authority, he argues that investigation and determination is "a *judicial act*" and hence that it is a function that "*cannot be delegated*".

His argument there is that the determination contemplated by the Act "necessarily calls for the exercise of the *judicial faculty*", and that "to make such a determination after an investigation shows clearly that the Act is not ministerial *but judicial*" (page 118).

His chief reliance for that contention seems to be the case of *Runkle v. United States*, 122 U. S. 543. There the statute imposed upon the President the judicial function of affirming or disapproving sentences of a general court martial. This Court held that that was a judicial function which the Statute did not provide could be delegated. Appellant quotes at length from the opinion of the Court, but he omits the following passage from that opinion, which clearly points out the distinction between that case and the case at bar:

"Undoubtedly the President, in passing upon the sentence of a court-martial, and giving to it the approval without which it cannot be executed, acts judicially. THE WHOLE PROCEEDING FROM ITS INCEPTION IS JUDICIAL. The trial, finding, and sentence are the solemn acts of a Court organized and conducted under the authority of and according to the prescribed forms of law. IT SITS TO PASS UPON THE

MOST SACRED QUESTIONS OF HUMAN RIGHTS THAT ARE EVER PLACED ON TRIAL IN A COURT OF JUSTICE; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged according to law. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the President, and without whose approval the sentence cannot be executed, is as much a part of this judgment, according to law, as is the trial or the sentence. WHEN THE PRESIDENT, THEN, PERFORMS THIS DUTY OF APPROVING THE SENTENCE OF A COURT-MARTIAL DISMISSING AN OFFICER, HIS ACT HAS ALL THE SOLEMNITY AND SIGNIFICANCE OF THE JUDGMENT OF A COURT OF LAW."

The determination of the enemy character of property, which the President under the Act is authorized to make, is not in the proper sense of the word a "judicial proceeding".

In various parts of his brief counsel for the appellant argues that the Act is unconstitutional because property is seized without a judicial proceeding. But in Point IX of his brief he argues that the determination is "a judicial act and involves a judicial proceeding".

It is a far cry from a judicial proceeding in which, to use the language of this Court in the *Runkle* case, "the most sacred questions of human rights" are passed upon and an investigation and determination in the exercise of the war power of the enemy character of rights and property.

The only decided case under the present Act where the argument of counsel for the appellant in his Point IX was made and discussed was the case of *Kahn v. Garvan*, 263 Fed. Rep. 909, 916. But in that very case, *Runkle v. United States* was cited by the Court as authority for the proposition that the duty imposed upon the President by Section 7(c) of the Act was executive and not judicial.

Counsel for the appellant quotes from the opinion in the *Runkle* case further as follows:

"There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts."

But in making that quotation he omits the very next sentence in that paragraph, which reads as follows:

"That has been many times decided by this Court. *Wilcox v. Jackson*, 13 Pet. 498, 513; *United States v. Eliason*, 16 Pet. 291, 302; *Confiscation Cases*, 20 Wall. 92, 109; *United States v. Farden*, 99 U. S. 10, 19; *Wolsey v. Chapman*, 101 U. S. 755, 769."

Among the foregoing cases cited by this Court in the *Runkle* case is one case which is practically conclusive against the contention of counsel for the appellant under this point. That is the *Confiscation Cases*, 20 Wall. 92, 109. In that case the act of July 17, 1862, entitled: "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate property of rebels and for other purposes", provided that "*It shall be the duty of the President of the United States to cause the seizure*" of the property of persons named in the said act and to apply and use the same and the proceeds thereof for the support of the army of the United States.

The act also provided that to secure the condemnation and sale of any such property, after the same should have been seized, so that it may be made available for the purposes aforesaid, proceedings *in rem* should be instituted in the name of the United States in the United States Courts, which proceeding should conform, as nearly as might be, to proceedings in admiralty or revenue cases.

Under the Act, the United States filed a libel of information for the condemnation of certain real property.

One of the averments of the information was that the real property had been seized by the marshal in compliance with written instructions issued by the Attorney General of the United States to the District Attorney of the district in which the action was brought by virtue of an Act of July 1862.

It was contended that the Court had no jurisdiction, even if the seizure alleged in the information was made, BECAUSE IT WAS NOT MADE BY ORDER OF THE PRESIDENT OF THE UNITED STATES. It was held that the contention was not well founded and that the direction given by the Attorney General must be regarded as a direction given by the President.

That case is almost identical with the case at bar. Under the Act of July, 1862, there was, as in the present Act, an initial seizure prior to judicial determination. That seizure necessarily implied a determination that the property seized was the property of one of the persons named in the Act. That determination is analogous to the same determination which is required under *The Trading with the Enemy Act* to be made by the President. The *Confiscation Cases*, therefore, are absolute authority for the right of the President to delegate the power conferred upon him by section 7(c) of the Act.

Both the Act of July 1862 and the present Act provide for an initial sequestration and a subsequent judicial determination of ownership. The difference between the two is that under the Act of July 1862 the initiative in bringing the proceeding to determine the title of the property was upon the government, whereas under the present Act such initiative is upon the claimant. But in both cases there was to be an initial sequestration of the property. Such sequestration was obviously an executive and administrative act, and was so held in the *Confiscation Cases* (*supra*).

The arguments of counsel for the appellant are not novel. The claim has frequently been made that certain administrative acts involve the exercise of a judicial power and hence they cannot be delegated to administrative officers.

One of the latest of the decisions of this Court on that subject was in the *Selective Draft Cases*, 245 United States 366, 389 (1917) where it was argued that the Act was void as a delegation of federal power to state officers and also that the statute was void because it vested administrative officers with legislative discretion and also that THE ACT WAS VOID BECAUSE OF AN ALLEGED "CONFERRING OF JUDICIAL POWER". The Chief Justice of this Court disposed of those arguments briefly and conclusively as follows:

"It remains only to consider contentions which, while not disputing power, challenge the act because of the repugnancy to the Constitution supposed to result from some of its provisions. First, we are of opinion that the contention that the Act is void as a delegation of federal power to state officials because of some of its administrative features, is too wanting in merit to require further notice. Second, we think that the contention that the statute is void because vesting administrative officers with legislative discretion has been so completely adversely settled as to require reference only to some of the decided cases. *Field v. Clark*, 143 U. S. 649; *Buttfield v. Stranahan*, 192 U. S. 470; *Intermountain Rate Cases*, 234 U. S. 476; *First National Bank v. Union Trust Co.*, 244 U. S. 416. A LIKE CONCLUSION ALSO ADVERSELY DISPOSES OF A SIMILAR CLAIM CONCERNING THE CONFERRING OF JUDICIAL POWER. *Buttfield v. Stranahan*, 192 U. S. 470, 497; *West v. Hitchcock*, 205 U. S. 80; *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 338-340; *Zakonaite v. Wolf*, 226 U. S. 272, 275".

POINT XII

The contention of the appellant that the Alien Property Custodian precluded himself from seizing the 14,900 shares because he had seized the rights of the Leipzig company under the contract, is unfounded in fact and unsound in law

This is argued under appellant's point XII (pages 130-131). Appellant's point XII reads: "The Alien Property Custodian having elected to seize the cause of action of the Leipzig company against the New York company for the unpaid purchase price for the 14,900 shares of the Botany Worsted Mills (defendants' Ex. L-1, rec. p. 271), he thereby precluded himself because of the election made to seize the 14,900 shares of stock transferred to the New York company, his election to recognize the transaction as a sale being inconsistent with the position taken by him in the present case."

Whether intentionally or not, the foregoing is misleading, for it implies that the demand by the Alien Property Custodian for the rights of the Leipzig company *under* the contract *preceded* his seizure of the shares. **THE VERY CONTRARY IS THE FACT.** In view of the misstatement contained in appellant's point XII, it is well to state the dates of the two seizures.

The Alien Property Custodian seized the 14,900 shares on April 5, 1918 (defendants' Exhibit 9, pages 202-205; folios 380-382).

Nearly a year later, on March 13, 1919, he demanded the rights, privileges and benefits of the Leipzig company *under* the contract (defendants' Exhibit L-1, pages 271-272; folios 478-480).

But not only does he misstate the order in which those seizures were made, representing that the seizure of the rights of the Leipzig company under the contract preceded the seizure of the shares, but he goes on to say that "the appellees are thus seeking to blow hot and cold at the same

time". That, too, is a misrepresentation of fact, for the demand of the rights of the Leipzig company under the contract, made March 13, 1919, contained an express provision that it "SHALL NOT PREJUDICE OR AFFECT ANY DEMAND HERETOFORE . . . MADE WITH RESPECT TO SAID 14,900 SHARES, OR ANY RIGHTS, PRIVILEGES OR BENEFITS ACQUIRED BY VIRTUE THEREOF".

The fallacy in the appellant's argument is brought out by the fact that the first seizure was of the shares, April 5, 1918. Next followed the demand of the rights of the Leipzig company under the contract, March 13, 1919, but that demand was expressly subject to "all rights, privileges or benefits" acquired by the Alien Property Custodian under his seizure of the shares a year previous, April 5, 1918.

He then (page 130) argues that the "effect of this dual and inconsistent attitude is to deprive the New York company of the ability to use the shares of stock for the purpose of financing their payment". It is difficult to be patient with such an assertion. He coolly ignores the fact that the shares were not in this country for years before the contract, or at the time of the making of the contract, or since, and therefore that even if there had been no seizure of any kind the New York company could not "use the shares of stock for the purpose of financing their payment".

Furthermore, there could not have been legally any payment during the war, and hence the seizure of the shares during the war did not prevent the New York company from "using the shares for the purpose of financing their payment".

The theory of election does not have any application to either the facts of this case or the rights of the Alien Property Custodian. The doctrine of election has no relation to the determination and seizure by the Alien Property Custodian.

The rule is well stated in 15 Cyc, 252, as follows:

"Election of remedies has been defined to be the right to use or the act of using up different actions or remedies, where plaintiff has suffered one species

of wrong from the act complained of. And broadly speaking, an election of remedies is the choice by a party to an action of one or more coexisting remedial rights where several such rights arise out of the same facts; but the term has been generally limited to a choice by a party between inconsistent and remedial rights".

Other definitions are:

"The right of selecting one of several forms of action for the redress of injury or enforcement of a right".—*English Law Dictionary*.

"The choice between two or more coexisting and inconsistent remedies for the same wrong".—*Cyclopaedia Law Dictionary*.

With regard to the necessity of election it has been said that:

"In order that election must be made, the party must have at his command different coexisting remedial rights, which are inconsistent, and not analogous, consistent and concurrent".—15 *Cyc*, 257.

It might be a sufficient answer to the suggestion that the Alien Property Custodian has made an election which he was compelled to make, that he was not a "plaintiff" seeking a "remedy". In other words, the doctrine of election is a technical doctrine relating to a plaintiff seeking a remedy in a court of law.

But even upon the rules laid down for plaintiffs seeking a remedy, the claims of the Alien Property Custodian to title to the shares in disaffirmance of the contract and in claiming under it are not inconsistent. It has been held that actions which proceed upon the theory that the title to property remains in the plaintiff are naturally inconsistent with those which proceed upon the theory that title has passed to the defendant. But there is no inconsistency

between different legal remedial rights *all* of which are based upon the denial of the claim of title to property in the plaintiff and all of which are based upon the affirmance of title in the defendant.

In *re Garver*, 176 N. Y., 386, it was held that the commencement of an action by a judgment creditor to set aside an assignment for the benefit of creditors on the ground of fraud did not constitute an election by him to take in hostility to the assignment within the doctrine of election of remedies, and that although he was successful as to a portion of the property transferred to the assignee, if the judgment resulted in no benefit to him he might take under the assignment notwithstanding his attack upon it, and the judgment constituted no bar to such relief.

On the other hand, it was held in *Tauszig v. Hart*, 49 N. Y., 301, that where a stock broker, without authority, transferred to himself stock of a customer in his hands for sale, and sold at an advance, the customer cannot charge the broker either as purchaser or as guilty of conversion and at the same time treat the stock as sold, and cannot ask for an accounting.

In the case at bar, the Alien Property Custodian investigated and determined that the ownership in the 14,900 shares was in the Leipzig company on April 5, 1918.

He accordingly seized the shares. The title vested in him upon that seizure. On March 13, 1919, he seized the rights, privileges and benefits of the Leipzig company under the contract (defendants' exhibit L-1, pages 271-272; folios 478-480). But in that seizure and demand of March 13, 1919, it was expressly stated that it "shall not prejudice or affect any demands heretofore . . . made with respect to said 14,900 shares or any rights, privileges or benefits acquired by virtue thereof".

It cannot seriously be disputed that the Alien Property Custodian has *all possible rights* of the Leipzig corporation. The fact is that the Alien Property Custodian has the rights of the Leipzig company "both ways".

Federal equity rule 30 provides: "The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his de-

fense." Under that rule the defendant is not put to an election as to his defenses. But even if he were put to an election, there can be no inconsistency within the meaning of the doctrine of election where the claim of the defendant is a claim of title. Defendant is entitled to prove title to property in dispute on any theory available.

CONCLUSION

The judgment of the District Court dismissing the original and supplemental bills of complaint on the merits, with costs, should be affirmed

Respectfully submitted

JOHN QUINN

Solicitor for

Botany Worsted Mills

The Directors of Botany Worsted Mills
and

Stoehr & Sons, Inc.

and

The Directors of Stoehr & Sons, Inc.

JOHN QUINN

PAUL KIEFFER

Of Counsel

FILE COPY

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**JAMES D. MAHER,
CLERK**

No. 546

Supreme Court of the United States

OCTOBER TERM, 1920

MAX W. STOEHR

Appellant

against

JAMES N. WALLACE and others

Appellees

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK**

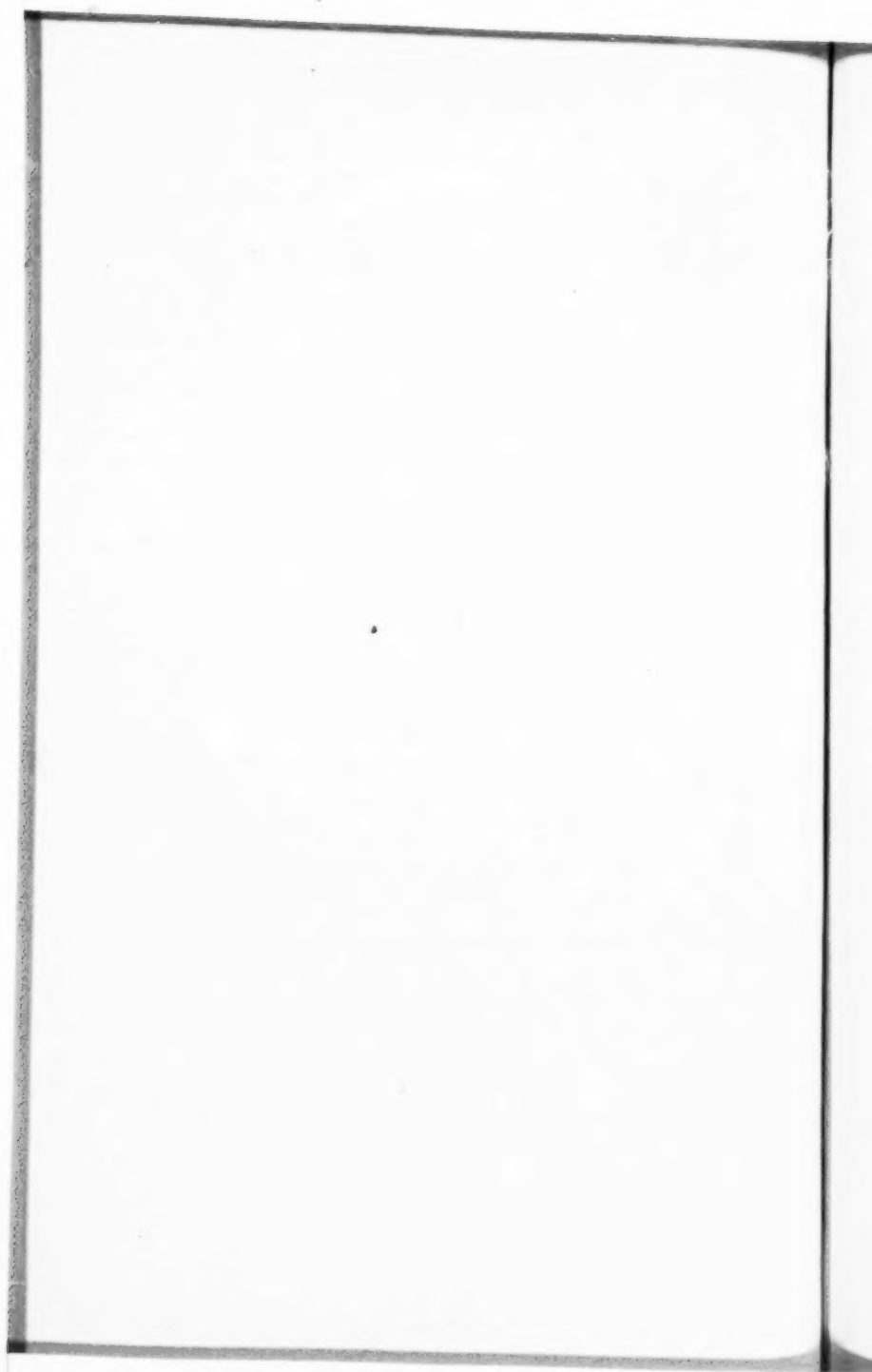
APPENDIX TO BRIEF

JOHN QUINN

PAUL KIEFFER

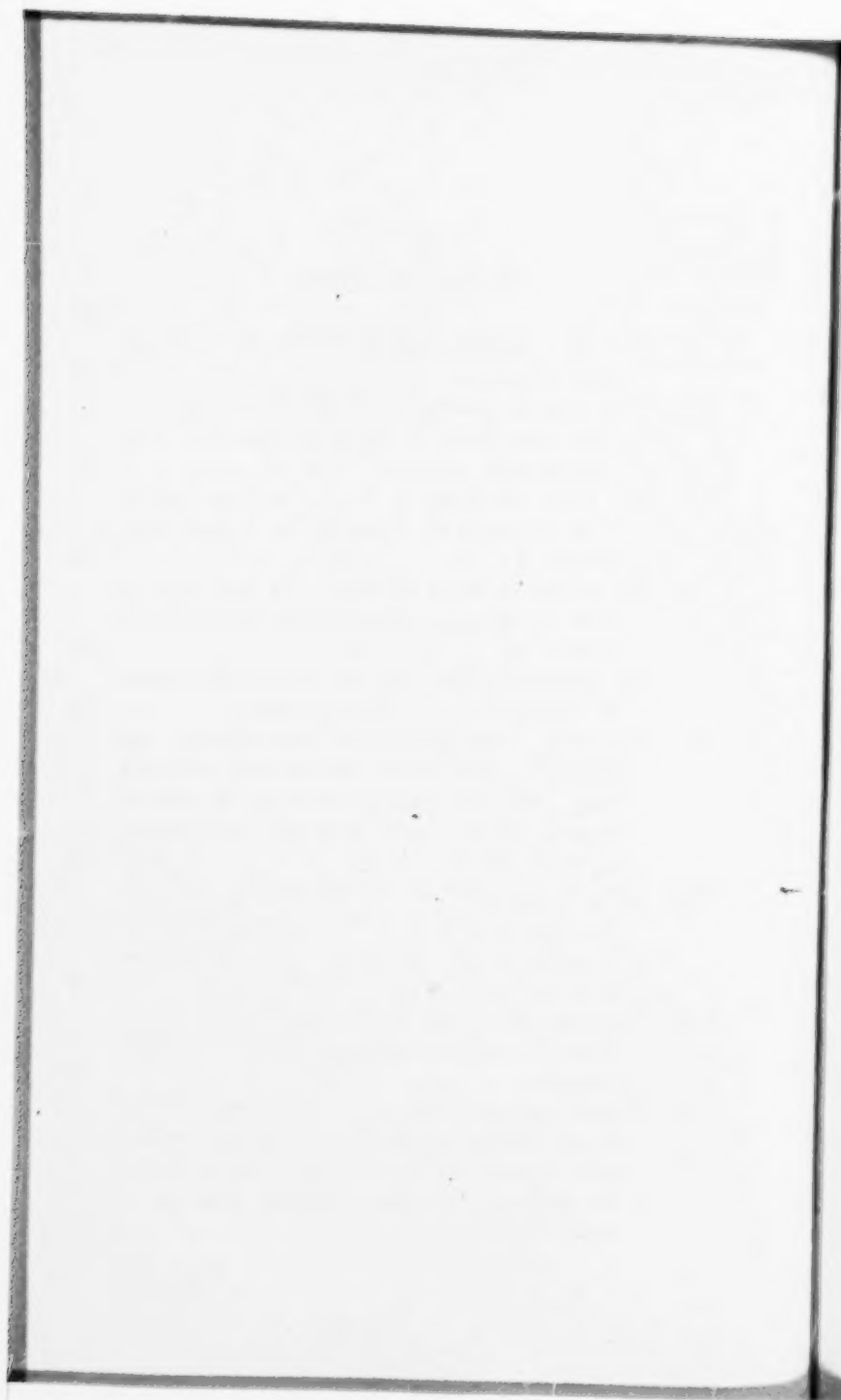
Counsel for

*Botany Worsted Mills and its Directors
Stoechr & Sons, Inc. and its Directors*



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I

Two late English cases upon the effect of war upon contracts

The decisions which we are about to consider are among the greatest decisions that have been made by any Court upon the subject that is up for decision in the case at bar. Their reasoning is so masterly; the exposition of the decided law is so luminous; their grasp of the great principles of public policy involved is so wise and is so truly in the great and best traditions of the greatest Courts of the world; their reasoning is so free from mere technicalities; they render obsolete so many ill-considered discussions of the question; the rule and the test that they apply are so conclusive and of such universal application; they show such a broad understanding of the great and vital interests that were involved in the titanic struggle that is not yet ended; they are such splendid examples of judicial courage; the conclusions they have reached are so certain to become the general law of the world; they are such a complete demonstration of the fact that, when war has broken all the bonds of custom, all treaties, all conventions, all intercourse, and has, on the side of the Germans, obliterated all or all but all considerations of humanity itself, that it is futile and provocative of uncertainty for Courts to attempt to adjust and to re-create broken contracts instead of leaving all such intricate and momentous questions to be dealt with by those whose duty it is to formulate the terms of peace and to fix the private rights of the citizens or subjects whose countries have been at war—because of all these considerations we offer no apology for considering them here at such length as they so richly deserve.

I

Zinc Corporation, Limited v. Hirsch and others (1916), 1 K.B. 541. It was decided in the King's Bench Division August 3, September 7, 1915, and in the Court of Appeal

November 18, 19; December 15, 16, 21, 1915. The plaintiff was a company incorporated in England, and agreed before the war to sell, and the defendants, who resided and carried on business in Germany, agreed to purchase during each of the ten years 1910 to 1919, both inclusive, the whole of the plaintiffs' production of zinc concentrates at the plaintiffs' mine in Australia. The production was agreed not to be less than 85,000 tons nor more than 95,000 tons in each year. The plaintiffs were prohibited, so long as the contract should be in force, from selling any zinc concentrates to any person other than the defendants. The defendants were entitled at any time to leave 2200 tons of concentrates on the plaintiffs' floors and 800 tons in their vats at the plaintiffs' expense.

By clause 17 of the contract of 1908 it was provided that in the event of strikes, suspension of labour, floods, fire, stoppage of water supply, acts of God, "*force majeure*, or any cause beyond the control of either the sellers or the buyers" preventing or delaying the carrying out of the contract "then this agreement shall be suspended during the continuance of any and every such disability".

War was not specified as a cause of suspension.

The contract contained various provisions as to notices being given, as to fixing the price of and the method and time of payment for the concentrates, as to weighing, sampling and assaying the concentrates, and as to other matters.

On the outbreak of the war between Great Britain and Germany on August 4, 1914, the defendants became alien enemies.

The contract was acted upon until a few days before August 4, 1914, when the defendants gave to the plaintiffs notice that they should discontinue taking ore, and deliveries of zinc concentrates by the plaintiffs to the defendants thereupon ceased.

On the trial the chairman of the plaintiff company demonstrated the difficulty the plaintiffs would have in selling their concentrates if, on the termination of the war, they were bound to resume deliveries to the defendants. The action was for a declaration that the agreement was

abrogated and voided by the existence of a state of war between Great Britain and Germany on August 4, 1914, and that the plaintiffs should be released from any duty or obligation AT ANY TIME to supply to the defendants zinc as provided in the contract.

Counsel for the plaintiffs in the Kings Bench Division argued that the provisions of clause 17 that "this agreement shall be suspended during the continuance of any and every such disability" meant only that, on the assumption that war came within the category of disabilities therein mentioned, deliveries of the zinc concentrates should be suspended, and that the provision did not mean that the whole agreement should be suspended. He argued that the further performance of the contract therefore became illegal, inasmuch as it would involve commercial intercourse with the enemy during the war.

One of the most significant things in the argument of counsel for the plaintiffs and of counsel for the defendants and in the Judge's opinion is that the matter was not treated technically but was considered on the ground of illegality and on the broad principles of public policy.

Counsel for the plaintiffs in the court below also argued that if in the case of a contract made before the war with a person who becomes an alien enemy "anything remains to be done under it after the outbreak of war BEYOND MERE PAYMENT, the further performance of the contract becomes illegal and it is dissolved. Where, however, the cause of action accrued before the war, AND NOTHING REMAINS TO BE DONE UNDER THE CONTRACT EXCEPT PAYMENT, the contract is only suspended during the war" (1916, 1 K.B. 545).

Counsel for the plaintiffs then quoted from the case of *Janson v. Driefontein Consolidated Mines* (1902) A.C. 484, 509, where Lord Lindley said:

"War produces a state of things giving rise to well known special rules. It prohibits all trading with the enemy except with the Royal license, AND DISSOLVES ALL CONTRACTS WHICH INVOLVE SUCH TRADING".

Lord Lindley referred to the case of *Esposito v. Bowden* (1857) 7 E. & B. 763, 784, where Willes, J. in delivering the judgment of the Exchequer Chamber, adopted the language of Lord Tenterden in his work on *Shipping*, fifth edition, page 427:

"If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the Government of the country, THE AGREEMENT IS ABSOLUTELY DISSOLVED."

Counsel for the plaintiff also quoted Lord Alvanley, C. J. in *Furtado v. Rogers* (1823) 3 Bos. & P. 191, 198, to the effect that "it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country".

Counsel for the plaintiff also cited the case of *Robson v. Premier Oil and Pipe Line Co.* (1915) 2 Ch. 124, 136, where it was laid down by the Court of Appeal that "a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy" came within the principle upon which intercourse is prohibited, namely, that of public policy.

Counsel for the plaintiff then argued:

"A negative clause is within that principle. The test, therefore, is, is the contract detrimental to the interests of this country or beneficial to the enemy country? If it is, it is illegal and is dissolved on the outbreak of the war. Contracts which involve commercial intercourse with the enemy are therefore illegal."

It will thus be seen that counsel for the plaintiff dealt with the question upon large lines of public policy and not upon mere technical considerations.

Compston, K. C., for the defendants, argued that the operation of clause 17 was merely "to suspend delivery of the concentrates during the war", and that the con-

tract would still remain in force, "because nothing would have to be done except adjustment of the accounts, and that would not involve trading with the enemy."

Counsel for the defendants also stated their willingness "to consent to the plaintiffs selling concentrates during the war, so that there would be nothing contrary to the interests of Great Britain in the contract being suspended during that period." He argued that the contract was only suspended by war AS TO DELIVERIES, and that it was only dissolved so far as trading with the enemy was concerned, and that if the war prevented the further performance of "part of the contract" there was no reason why it should prevent the performance of the rest of the contract, and that "A contract for delivery by instalments stands upon a different footing from other contracts" and that the court could eliminate the illegality and "say that deliveries are to be resumed after the war as being perfectly legal."

Counsel for the defendant also argued: "An executory contract is dissolved ONLY IF IT MUST BE PERFORMED DURING THE WAR".

It will thus be seen that the plaintiffs contended that the outbreak of the war rendered "the further performance of the contract illegal and that it was dissolved".

The defendants, on the other hand, contended that "it was merely suspended during the continuance of the war", and they relied mainly on clause 17.

Bray, J., delivering the judgment of the Kings Bench below, said that he thought that, apart from that clause, the contract would be dissolved. He then proceeded to discuss the effects of the war, and among other things said:

"Lord Lindley in *Janson v. Driefontein Consolidated Mines* (1902) A. C. 484, 509, stated the law thus: 'War produces a state of things giving rise to well-known special rules. It prohibits all trading with the enemy except with the Royal license, and dissolves all contracts which involve such trading.'

"The passage in *Esposito v. Bowden*, 7 E. & B. 763, 784, relied on by Lord Lindley is as follows:

'If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the Government of the country, the agreement is absolutely dissolved.'

"I think there can be no doubt that that is the law. I THINK, FURTHER, THAT IF THE PERFORMANCE OF ANY TERM OF THE AGREEMENT OR THE EXERCISE OF ANY RIGHT OR OPTION GIVEN BY IT BE RENDERED UNLAWFUL THE WHOLE AGREEMENT IS DISSOLVED. THE COURT CANNOT SUBSTITUTE FOR THE AGREEMENT MADE BY THE PARTIES AN AGREEMENT MINUS ANY ONE OF ITS TERMS. THE PARTIES HAVE NEVER SO AGREED. It is not contended here that the agreement was severable."

(Parenthetically it might be argued with reference to *Stocker v. Wallace et al.*, that there was more to be done between the New York company and the Leipzig company than the payment of money. There were "exercises of rights" and "options" that might be given, as has been shown later.)

Bray, J., gave careful consideration to the provisions of clause 17, and said that he thought that the natural meaning of the words "This agreement shall be suspended" was that ALL the provisions were to be suspended and that ALL of the rights and obligations of each of the parties were to cease during the continuance of the cause of suspension. But he pointed out that counsel for the defendant had been bound to admit that that could not be the meaning, and that it could not have been the intention of the parties, for instance, that the obligation for payment for ores already delivered should be suspended, but that that and the necessary steps for arriving at the amount due were the only exceptions, and that they would involve no illegal act.

He further pointed out that the plaintiffs, on the other hand, relied upon "many of the clauses of the agreement

as containing provisions which equally the parties could not have intended to be suspended, and which would involve commercial intercourse."

He therefore examined the whole agreement, and as a result of his examination he stated that he had come to the conclusion that the plaintiffs' contention was correct and "that suspension of the agreement meant only suspension of deliveries. The end and object of the agreement was the sale and delivery by plaintiffs to defendants of a certain quantity of ores produced by the plaintiffs at Broken Hill, Australia."

After examining the provisions of the agreement he held that upon its true construction "the only suspension contemplated under it was the suspension of the deliveries of zinc concentrates, and that the right to give notices and the jurisdiction of arbitrators was not suspended; THAT IT WOULD BE ILLEGAL FOR THE PLAINTIFFS TO GIVE SUCH NOTICES DURING THE WAR; THAT THE GIVING OF SUCH NOTICES WOULD CONSTITUTE COMMERCIAL INTERCOURSE, AND WOULD BE THE EXERCISE OF A PRIVILEGE GIVEN TO THE PLAINTIFFS BY THE CONTRACT AND WOULD BE PART AND PARCEL OF THE CONTRACT."

He also came to the conclusion that he must construe the words of clause 17 as providing only for "suspension of deliveries of zinc concentrates" and that "there would still remain things to be done, OR RIGHTS TO BE EXERCISED, which, after the outbreak of war between Great Britain and Germany, WOULD BE ILLEGAL."

He concluded his opinion as follows:

"It results, therefore, I think, that the contract was dissolved on August 4, 1914, and that the plaintiffs are entitled to a declaration to that effect."

The defendants appealed.

So in the case at bar we have the whole contract executory WITH NOT EVEN THE TRANSFER OF THE BARE LEGAL TITLE TO THE NEW YORK COMPANY. If the exercise of options as contemplated by the contract ON ITS FACE, the giving of notices, the forfeiture of rights, the delivery of shares, the fixing of the purchase price and the payment

of the purchase price, are all illegal, then the Court cannot "substitute for the agreement made by the parties an agreement minus any one of its terms" and the legal title and beneficial interest remains in the Leipzig company.

Inasmuch as the agreement involved the EXERCISE OF RIGHTS AND OPTIONS which rendered it unlawful, inasmuch as it contemplated payments which became illegal, the "whole agreement was dissolved". The result of the dissolution of the whole agreement meant that the shares were subject to seizure by the Alien Property Custodian, just as though the 14,900 shares had continued in the names of Hans Stoehr and Max Stoehr as trustees for the Leipzig corporation.

The *Zinc case* came on before the English Court of Appeal November 18 and 19 and December 15 and 16, 1915.

The opinions in the Court of Appeal in the *Zinc case* are in (1916) 1 K. B. 551, et seq.

There were three opinions in the Court of Appeal.

As in the court below, the plaintiffs contended that the effect of the war was to "put an end to and dissolve the contract".

Again the defendants contended that "the contract was merely suspended during the war and would again immediately become operative on the restoration of peace".

A great deal was said about the provisions of clause 17, and Lord Justice Eady, after considering the authorities and exhaustively examining the numerous and intricate provisions of the agreement, held that it was not possible to give to the words in clause 17 "This agreement shall be suspended" their natural and ordinary meaning, and that the words meant that "deliveries under the contract are to be suspended". The result of that construction was that the agreement did "not contain a clause suspending its entire operation during the war, but it is to be read as if the clause merely suspended deliveries, leaving the rest of the contract subsisting between the parties to be performed according to its tenor".

Having thus decided the meaning of the contract, he dealt with it in a large, UNTECHNICAL way. Large questions of policy were involved.

Lord Justice Eady said (1916) 1 K. B. 556:

"But to carry out during the war *any part* of the contract would involve intercourse with the enemy, and so would be illegal. Under clause 2 of the agreement of 1910 the NOTICE is to be given before April 30 in each year. This NOTICE regulates not only the yearly quantity but the monthly quantity, as delivery is to be given and taken in about equal monthly deliveries. Again, the notice exercising the OPTION under clause 2 of the agreement of 1910 cannot be given. Again, under clause 6 of the agreement of 1910 NOTICE is to be given before July 5 in the year following the year of delivery. There are other clauses, including the arbitration clause, 21, of the agreement of 1908, ALL POINTING TO THE NECESSITY OF INTERCOURSE, although deliveries may be suspended under clause 17, and thus rendering the further performance of the contract illegal. The result is that the outbreak of war has DISSOLVED the contract between the parties so far as regards the future performance after August 4, 1914."

So in the case at bar the contract involved "exercising options" and the giving of notices.

It cannot be contended in the case at bar, as it was in the *Zinc case*, that the parties INTENDED that the operation of the contract should be suspended during the war. The contract here was made in express view of the war. It bears on its face the demonstration of the intention of the parties. The Heyn & Covington letter removes doubt on that subject. And yet, although it was made upon the eve of war and with direct relation to war, the parties did not provide even on the FACE of it that any rights or the whole of it should be suspended during the war. That feature of the *Zinc case* is out of this case. Here the parties expressly intended on the *face* of it and provided for certain things TO BE DONE DURING THE WAR. Inasmuch as there was no provision in the contract providing for the suspension of rights or the suspension of any parts of the contract or the suspension of the contract as a whole during the

war, the principle applies that, as the performance of the contract during the war would involve intercourse with the enemy, upon the outbreak of the war it became illegal and was dissolved. As there was nothing in the contract providing for the suspension of any part of the contract or of all of it during the war, it was dissolved "so far as regards future performance" after April 6, 1917.

What result flows from this? If all the parts of the contract were dissolved so far as future performance is concerned, the legal title and the beneficial ownership remained in the Leipzig company. But there our Trading with the Enemy Act steps in and provides that rights possessed by the German enemies, namely, ownership by the Leipzig corporation upon the dissolution of the contract, are vested in the Alien Property Custodian.

Now to resume from the opinion of Lord Justice Eady: Having demonstrated that the exercise of the rights and options provided for in the contract made it illegal, he considered the case from another point of view, that of public policy. He pointed out that the contract not only provided that the defendants should purchase the plaintiffs' whole production, but it also stipulated that the plaintiffs should not sell their concentrates to any other person, and that the negative stipulation remained in force, according to the tenor of the agreement, as well during a war as during a temporary strike or accident or breakdown of machinery. He pointed out that by clause 5 the defendants had the right to leave as much as 2200 tons of concentrates on the plaintiffs' floors and 800 tons in their vats at plaintiffs' risk for an indefinite period. He pointed out that thus the defendants could not take delivery, and yet, according to the contract, the plaintiffs could not sell their productions elsewhere, and must keep their floors and vats and other premises encumbered with the concentrates which they were not permitted to dispose of, and thus the whole of the industry must be brought to an entire standstill. Then Lord Eady laid down the following significant principles:

"I have in my mind and am fully aware of the letter of the defendants' solicitors of July 20, 1915"

(the letter stating that the defendants "would have no objection to agreeing that the concentrates produced during the war should be free for your clients to dispose of if it would end the question in this case"), "BUT THE RIGHTS OF THE PARTIES MUST BE CONSIDERED WITH REFERENCE TO THEIR POSITION UNDER THE AGREEMENT AT THE OUTBREAK OF WAR. Moreover, even if the plaintiffs were entitled to sell elsewhere any concentrates produced during the war, it might be a matter of extreme difficulty to the plaintiffs to do so to the best advantage if they are unable to enter into forward contracts for definite periods, and can only dispose of such concentrates as at the moment they have on hand, and with the risk of being called upon, possibly at short notice, to resume deliveries to the defendants. The effect of such an agreement as the present one, dealing with an important commercial product on a very large scale, is to prevent the resources of the country from being developed and labour from being employed, and the value of the mineral from being realized and the proceeds utilized in the best interests of the country. MOREOVER, THE RESULT OF PRESERVING INTACT FOR THE DEFENDANTS (AS THE AGREEMENT PURPORTS TO DO) ALL CONCENTRATES ON THE FLOORS, IN THE VATS, OR OTHERWISE MADE READY BY THE PLAINTIFFS WOULD BE TO PROTECT THE DEFENDANTS' TRADE DURING THE WAR AND ENABLE THE DEFENDANTS UPON THE CONCLUSION OF PEACE TO RESUME THEIR TRADE AS SPEEDILY AND IN AS GREAT VOLUME AS POSSIBLE, AND SO TO DIMINISH THE EFFECT OF WAR ON THE COMMERCIAL PROSPERITY OF THE ENEMY COUNTRY, WHICH IT IS THE OBJECT OF THIS COUNTRY DURING THE WAR TO DESTROY. TO RECOGNIZE SUCH A CONTRACT DURING WAR AND TO GIVE EFFECT TO IT BY HOLDING THAT IT REMAINED LEGALLY BINDING UPON THE CONTRACTING PARTIES WOULD BE TO DEFEAT THE OBJECT OF THIS COUNTRY IN CRIPPLING THE COMMERCE OF THE ENEMY. 'IT WOULD BE TO UNDO BY MEANS OF BRITISH TRIBUNALS THE WORK DONE FOR THE BRITISH

NATION BY ITS NAVAL OR MILITARY FORCES': *per Lord Lindley in Janson v. Driefontein Consolidated Mines* (1902) A. C. 507. SUCH AN AGREEMENT IS, IN MY OPINION, VOID AS TENDING TO ASSIST THE KING'S ENEMIES. TO CARRY OUT SUCH AN AGREEMENT DURING THE WAR, AND TO WITHDRAW GOODS FROM COMMERCE AND PRESERVE THEM FOR THE ENEMY AFTER THE WAR, IS LITTLE REMOVED FROM ACTUALLY TRADING WITH THE ENEMY. *In Furtado v. Rogers*, 3 Bos. & P. 191, 198, LORD ALVANLEY, IN DELIVERING THE JUDGMENT OF THE COURT OF COMMON PLEAS, SAID: 'WE ARE ALL OF OPINION THAT ON THE PRINCIPLES OF THE ENGLISH LAW IT IS NOT COMPETENT TO ANY SUBJECT TO ENTER INTO A CONTRACT TO DO ANYTHING WHICH MAY BE DETRIMENTAL TO THE INTERESTS OF HIS OWN COUNTRY; AND THAT SUCH A CONTRACT IS AS MUCH PROHIBITED AS IF IT HAD BEEN EXPRESSLY FORBIDDEN BY ACT OF PARLIAMENT.'

"Moreover, upon what ground can an agreement not to sell goods during the war be binding in favor of a person who has become an alien enemy? HE CANNOT DURING THE WAR ENFORCE SUCH AN AGREEMENT. The true answer must be that the tie has become, not suspended, BUT DISSOLVED BY THE WAR. In the case of *The Hoop* 1 C. Rob. 196, 200, Lord Stowell said: 'In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a *persona standi in judicio*. . . . A state in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a Court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction; they have no legal existence; and the whole of such commerce is attempted without its protection and against its authority.' This language is as applicable to the future performance of a contract

entered into before the war as it is to entering into a contract during the war. The impossibility of enforcing it by an appeal to the law is the same in each case.

"Much of the language used by Chancellor Kent in *Griswold v. Waddington* (1819) 16 Johnson, Sup. Ct. New York, 438 (Court of Errors of New York) with reference to a contract of partnership, which he held was dissolved by war, is also applicable to the present case.

"I am of opinion that the contract in question BECAME DISSOLVED ON THE OUTBREAK OF WAR, and that the judgment below was right, and that this appeal fails."

Lord Justice Phillimore delivered a separate judgment, in which, after analyzing the contract, he said:

"The defendants being German subjects, this is an agreement which cannot continue to be performed during the war. I do not think there is any doubt about this. It would involve commercial intercourse with the enemy, which is unquestionably unlawful: *The Hoop*, 1 C. Rob. 196; *Esposito v. Bowden*, 7 E. & B. 763; *Furtado v. Rogers*, 3 Bos. & P. 191; *Janson v. Driefontein Consolidated Mines* (1902) A. C. 484; *Robson v. Premier Oil and Pipe Line Co.* (1915) 2 Ch. 124, and numerous other cases, English and American. The American cases up to that date are collected in *Kershaw v. Kelscy*, 100 Mass. 561.

"This agreement being incapable of continued performance during the war, 'the end of which cannot be foreseen' (*Esposito v. Bowden*, 7 E. & B. 792), is prima facie dissolved, abrogated, or avoided by the war: see *Esposito v. Bowden*, 7 E. & B. 783, and other cases."

Lord Justice Phillimore then dealt with the contention of the defendants that the general rule that war dissolved contracts did not apply because, as the defendants claimed,

the parties had made provision for that event and had provided for the suspension or the "putting to sleep" of the agreement during the war between the two countries, or for the postponement of its execution until peace returned. He then considered the provisions of clause 17 thus relied upon, and after a careful analysis of them rendered the opinion that clause 17 provided only for the "suspension of deliveries" and not "for suspension or postponement of the whole contract or of all the reciprocal duties under it." He then continued:

"If this conclusion is reached the agreement cannot remain in force. It might perhaps be enough to say that it fell under the general rule expressed in *Esposito v. Bowden*, 7 E. & B. 763. One might rely also upon the provision in clause 18 for storing up the metal for the enemy hereafter, as to which see the observations of Lord Alvanley in *Furtado v. Rogers*, 3 Bos. & P. 199, 200. But there is a more serious objection in clause 3 of the second agreement: 'The sellers shall not so long as this agreement shall be in force sell any zinc concentrates to any person or persons firm or firms or corporation or corporations other than the buyers.' BY THIS CLAUSE THE BRITISH SUBJECT IS PREVENTED FROM USING HIS RESOURCES—AND HOW IMPORTANT THESE PARTICULAR RESOURCES ARE THE FACTS IN THE CASE SHOW—FOR THE BENEFIT OF HIS COUNTRY. THE ENEMY IS ALLOWED TO TIE HIS HANDS DURING THE PERIOD OF THE WAR. IF 'ANY ACT OR CONTRACT WHICH TENDS TO INCREASE THE RESOURCES OF THE ENEMY' IS UNLAWFUL, AS WAS SAID IN *KERSHAW V. KELSEY*, 100 MASS. 573, SIMILARLY ANY ACT OR CONTRACT WITH THE ENEMY WHICH TENDS TO DIMINISH THE RESOURCES OF ONE'S OWN COUNTRY MUST BE EQUALLY UNLAWFUL. If, therefore, one of the causes of suspension under clause 17 is war between Great Britain and Germany, the agreement would be an unlawful one. If, however, as seems reasonable, we are to construe the agreement *ut res magis valeat*

quam pereat, we shall not admit this as one of the causes of suspension; and in that case the parties have not provided for the contingency of this war, AND THE ORDINARY RULE PREVAILS. The agreement has become incapable of performance by reason of the outbreak of war and has been dissolved.

"I think that the judgment of Bray J. is right and that this appeal should be dismissed."

Lord Justice Pickford also read an opinion in which he agreed with the decision of Bray, J., that suspension of the agreement meant only suspension of deliveries and that the other terms of the contract remained in force. After pointing out that if the contract was not dissolved the plaintiffs could not sell to the defendants because that would be trading with the enemy, and they could not sell to anyone else because to do so would be a violation of the terms of the contract, he said:

"This seems to me to be a relation between a British subject and an alien enemy of a nature which is contrary to public policy, because it is calculated to be of detriment to the interests of this country and of assistance to the King's enemies: see per Lord Halsbury in *Janson v. Driefontein Consolidated Mines* (1902) A. C. 491. * * *

"It is also, if it be necessary to consider the matter, a relation of a commercial nature. I do not think that it is material that the agreement contained in clause 3 was valid at the time it was made. As soon as the war began the defendants became alien enemies and THE RELATION BETWEEN THEM AND THE PLAINTIFFS, BEFORE THAT PERFECTLY VALID, BECAME INVALID. It seems to me that the case is exactly within the words of Lord Tenterden in his work on Shipping, 5th ed., p. 427, quoted with approval by Willes J. when delivering the judgment of the Exchequer Chamber in *Esposito v. Bowden*, 7 E. & B. 784: 'If an agreement be made to do an act lawful at the time of such agreement, but afterwards, AND BEFORE THE PERFORMANCE OF THE ACT,

the performance be rendered unlawful by the Government of the country, the agreement is absolutely dissolved.' It was argued before us that this only relates to the particular description of contract under consideration in that case, but I can see no difference in principle between that contract and any other, and I can see no difference in principle between an agreement to do an act by a British subject and an agreement imposing a restriction upon a British subject in favor of an alien enemy. This was the view taken by the Exchequer Chamber in *Esposito v. Bowden*, where Willes, J. a little later on the same page says: 'It may be added that the cases above put by Lord Tenterden cannot be treated as isolated propositions, but as instances of the general principle of law with which they are prefaced.' I do not in any way dissent from the conclusion that the existence of the unsuspended terms of the agreement would involve trading with the enemy, but in the view I take of the effect of clause 3 I have not thought it necessary to consider that matter in detail."

So in the case at bar to hold that *all* of the provisions of the contract were suspended automatically during the war, even though THE PARTIES DID NOT SO INTEND OR PROVIDE, and that hence the stock of the Leipzig company was beyond the reach of capture, would be to tie the hands of the Alien Property Custodian during the war. It would protect alien enemies' property during the war and enable alien enemies, upon the conclusion of peace, to regain possession of their property. The whole intent of the organization of the New York company, of the contract with the Leipzig company, the issuance of the stock of the New York company and the five-year trust of that stock, was to put a cloud upon the title of the alien-owned stock in the hope of preventing its seizure and its sale, if it should be seized, and meantime to retain control of the Botany Mills both during the war and after the war.

The whole scheme was an effort to diminish the effect of the war upon the commercial prosperity of the Leipzig company and the Leipzig company's stockholders, and hence the prosperity of the enemy country, which, as Lord Justice Eady said, "IT IS THE OBJECT OF THIS COUNTRY DURING THE WAR TO DESTROY".

To hold that the contract was not dissolved by the war, and that the right of the Leipzig company to the payment of money was merely suspended during the war, would be, as Lord Justice Eady said, "TO DEFEAT THE OBJECT OF THIS COUNTRY IN Crippling THE COMMERCE OF THE ENEMY."

If it be argued that the stock of the New York company owned by the alien enemies could be seized and that that seizure would *indirectly* carry possession of the 14,900 shares, the conclusive answer is that the rights of the Alien Property Custodian following upon the dissolution of the contract on the outbreak of the war, cannot be defeated by the pretense that he may possibly or probably GET SOME OTHER RIGHTS IN SOME OTHER FORM—a clouded title to some five-year voting trust certificates. That is a matter for him to determine and he has determined to enforce his rights against the 14,900 shares DIRECTLY arising from the dissolution of the contract upon the outbreak of war.

II

The other English case dealing with contracts for the sale of goods and the effect of the outbreak of the war during such a contract, and involving questions of public policy and of suspension or abrogation, is *Bieber & Company, appellants, v. Rio Tinto Company, respondents*, decided in the Privy Council in January 1918.

Bieber and Company, appellants v. Rio Tinto Company, Limited, respondents (1918) Appeal Cases 260, in House of Lords.

There were three cases before the House of Lords as follows:

Ertel Bieber and Company, appellants and Rio Tinto Company, Limited, respondents.

Dynamit Actien-Gesellschaft (Formals Alfred Nobel Company), appellants and Rio Tinto Company, Limited, respondents.

Vereinigte Koenigs and Larus-Heutte Actien-Gesellschaft Fuerbergbau and Huetttenbetrieb, appellants and Rio Tinto Company, Limited, respondents.

There were three appeals from three orders of the Court of Appeal affirming judgments of the court below of Sankey, J. The three appellants were German companies carrying on business in Germany. The respondent Rio Tinto Company, Limited, was incorporated in England and owned large mines of cupreous sulphur ore in Spain.

The contracts were made before the war between England and Germany for the supply by the Rio Tinto Company of cupreous sulphur ore to the three German concerns. The question before the House of Lords was whether such contracts had been entirely abrogated and avoided by the outbreak of the war or whether they were merely suspended during the war. The facts were fully stated by Lord Dunedin in his judgment in the first and second cases.

The third case was admittedly covered by the second.

In the first case, by an agreement of January 27, 1910, the Rio Tinto Company agreed to sell to the appellant 1,280,000 tons, 15 per cent. more or less in buyers' option, of cupreous sulphur ore to be shipped from Huelva, Spain, between February 1, 1911, and November 30, 1914, and to be delivered ex ship in Rotterdam, Hamburg, Stettin, and/or other European Continental ports, except ports in Great Britain, France, Belgium, and Spain and Portugal; and by subsequent agreements the quantity of ore was increased by 105,000 and 50,000 tons. At the outbreak of the war on August 4, 1914, a substantial part of this ore still remained to be delivered.

By a further agreement of October 9, 1913, the respondents agreed to sell the appellants 2,200,000 tons, 15 per cent. more or less in buyers' option, of cupreous sulphur ore to be shipped from Huelva between February 1, 1915, and November 30, 1919, on the same terms as before.

EACH OF THOSE CONTRACTS CONTAINED A SUSPENSORY CLAUSE which provided that if owing to strikes, war or any other cause, the shipper should be prevented from shipping or delivering the ore, the obligation to ship and/or deliver "should be suspended during the continuance of the impediment and for a reasonable time afterwards".

In the second case the respondents by two agreements dated January 19, 1910, and January 28, 1913, agreed by their agents, to sell to the appellants in all some 80,000 or 90,000 tons of ore, to be delivered in Rotterdam. Those contracts were made in Germany and were in the German language.

EACH OF THE CONTRACTS CONTAINED A SUSPENSORY CLAUSE which provided that in all cases of *force majeure* (which included, among other things, war) preventing the respondents from loading or shipping or delivering the ore, then for the duration of the effects of such impediment the carrying out of the obligations undertaken by them should be suspended.

The German agreements in the second case differed from the English contracts in the first case only in matters of detail. The only substantial difference between the second case and the first case consisted in the fact that the agreements in the second case were in the German form.

On August 4, 1916, the respondent, Rio Tinto Company, pursuant to orders of Bray, J., commenced actions under the Legal Proceedings against Enemies Act, 1915, against the several appellants claiming declarations that the contracts were abrogated and avoided by the existence of a state of war between Great Britain and Germany on August 4, 1914, and that the respondents, Rio Tinto Company, were thereby released from any obligation to perform them.

The Court of primary jurisdiction (Sankey, J.) held, on the authority of *Zinc Corporation v. Hirsch* (1916) 1 K. B. 541, that the contracts had become illegal and were dissolved and made the declarations asked for, and his decision was affirmed by the Court of Appeal.

The case was argued in the House of Lords in 1917, on November 23, 26, 27, 29.

The appellants argued that only those contracts are dissolved which IN FACT INVOLVE trading or intercourse with the enemy, and if the parties "by their contract provided that in the event of war there shall be no communication between them the contract is not determined"; that that is what the parties had done and that they had deferred the execution of the contract until the impediment was removed and for a reasonable time thereafter. The appellants sought to distinguish the decision in *Zinc Corporation v. Hirsch* (1916) 1 K. B. 541 on the ground that the respondents in the *Rio Tinto* case were under no restrictions as to dealing with the ore during the period of suspension. Counsel for the appellant tried to distinguish Lord Stowell's decision in *The Hoop* (1799), 1 C. Rob. 196, 200, 201; Lord Kenyon's decision in *Potts v. Bell* (1800), 8 T. R. 548, 561; *Furtado v. Rogers* (1802), 3 Bos. & P. 191, 198, and *Esposito v. Bowden* (1857), 7 E. & B. 763.

Counsel for the appellant also argued that a contract is illegal only in so far as it affords "assistance to the enemy during the war"; and that it is "no objection to the contract THAT IT MAY PROFIT THE ENEMY AFTER PEACE IS RESTORED". Citing *Daimler Co. v. Continental Tyre and Rubber Co.* (1916), 2 A. C. 307, 347.

Counsel for the appellant further argued that from the nature of the case "it cannot be a present assistance to the enemy that after the war he shall have a supply of material which he cannot use to the detriment of this country". Citing *Tingley v. Miller* (1917), 2 Ch. 144, 157, 160. He argued that the question of public policy did not enter into the *Rio Tinto* case.

As to the second case: The appellants argued that the respondents must prove their contract "illegal according to German law", and that before the contracts could be declared contrary to public policy it was necessary to ascertain "the public policy of the country to which the parties are subject", which seems to be a rather fishy argument. The chief argument was made by Compton, K. C.

If it meant anything, it meant that merely because the contract was in German, it was necessary to ascertain the public policy of the country TO WHICH THE PARTIES WERE SUBJECT, coolly ignoring the fact that one of the parties to the contract was not a German and was not "subject" to Germany.

Counsel for the respondents argued:

"It is no answer to say that these contracts must be construed according to German law. The English Courts will not enforce a German contract which is contrary to the policy of this country, and by the law of this country any contract which involves either intercourse with the enemy or advantage to the enemy is dissolved by the outbreak of war: *Halsey v. Esenfeld* (1916), 2 K. B. 707, 716. The respondents are prepared, if necessary, to contend that all executory contracts of a commercial nature are avoided by the war, though not involving communication with the enemy during the war. The existence of a commercial contract between a foreigner and a British subject is incompatible with a state of war existing between the two countries. It is only by the grace of the Crown that an enemy either holds property in the realm or can claim debts due to him. An alien enemy is outside the pale of English law, and, except by the grace of the Sovereign, has no rights within the law. All his civil rights cease. It is enough to say that all commercial contracts which are for the benefit of the enemy are avoided and that these contracts fall within this category".

The opinions of the House of Lords were rendered January 25, 1918. The first opinion was by Lord Dunedin, who among other things said:

"My Lords, the proposition of law on which the judgment of the Courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts

which for their further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject of the King, and the other contracting party, an alien enemy, or any one voluntarily residing in the enemy country. I use the expression 'often phrased commercial intercourse' because I think the word 'intercourse' is sufficient without the epithet 'commercial'. As to this I agree with the judgment of the Court of Appeal in the case of *Robson v. Premier Oil and Pipe Line Co.* (1915), 2 Ch. 124, 136, where Pickford, L. J., delivering the judgment of the Court, Lord Cozens-Hardy, M. R., himself and Warrington L. J., said: 'The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject WHICH MIGHT RESULT IN DETRIMENT TO THIS COUNTRY OR ADVANTAGE TO THE ENEMY IS PERMISSIBLE because it cannot be brought within the definition of a commercial transaction'.

"That so expressed it is an incontrovertible proposition admits, I think, upon the authorities, of no doubt. There are many cases, but what may be termed the landmarks of the law on the subject will be found in the judgment of Lord Stowell, in Admiralty, in the case of *The Hoop*, 1 C. Rob. 196 in the year 1799; in Lord Alvanley's judgment in 1802 in *Furtado v. Rogers* 3 Bos. & P. 191; and still more explicitly in the judgment of the Queen's Bench in 1857 in *Esposito v. Bowden* 7 E. & B. 763, where the members of the Court were Jervis, C. J., Pollack, C. B., Alderson B., and Cresswell, Crowder and Willes JJ. In recent decisions the proposition has been recognized in many cases. I would refer especially to the very learned and careful inquiry into the subject generally by Lord Reading, C. J., in the case of *Porter v. Freudenberg*, (1915) 1 K. B. 857, 866. And in your Lordships' House the proposition was at the root of the judgment in the case of

British and Foreign Marine Insurance Co. v. Sanday & Co., (1916) 1 A. C. 650 and was directly applied in the case decided this morning where the partnership was held dissolved by the war (*Hugh Stevenson & Sons v. Aktiengesellschaft fur Cartonnagen-Industrie, Ante*, p. 239)."

Lord Dunedin then considered the decision of *Esposito v. Bowden*, 7 E. & B. 763 and *Janson v. Driefontein Consolidated Mines*, (1902) A. C. 484, 493, and said:

"Now taking the legal proposition alone, and supposing that the contracts in question had contained no other clauses than those which I have set forth as to dates of delivery, it would at once follow that the first contract so far as unimplemented, is avoided; for the dates of delivery under it, so far as not performed, extended from August, 1914, to February, 1915, during which time a state of war has prevailed. It is also obvious that all dates of delivery under the second contract from February 1, 1915, up to the present time have been rendered illegal by the war. The only matter left would be this. The defendants' counsel argued that as it was possible that the war would end before November 30, 1919, there might still be a duty to deliver such instalments as are appropriate to the remanent period from the end of the war to November, 1919. BUT THAT WOULD BE TO TURN A CONTRACT FOR TWO MILLION TONS INTO A CONTRACT FOR FAR LESS. To meet this the defendants said that each monthly shipment was essentially a separate contract. The answer is to be found in what was said by Lord Selborne in the case of *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884) 9 App. Cas. 434, 439. That was the case of a contract for 5000 steel blooms with delivery 1000 tons monthly commencing on January next. His Lordship said the subsidiary terms as to time of delivery and as to payment did not split up the contract into as many contracts as

there should be deliveries, but there was one contract for purchase of that quantity of iron".

He then passed to the defense of the action based on the clause practically identical in both contracts regarding suspension, and to the argument of the defendants that the effect of that clause was to remove from the contract all necessity for the "forbidden thing" (intercourse during the war), and stated that the recent decision in *Esposito v. Bowden* was therefore gone and that there was no reason why the contract to deliver "after the war should not be good". As to this Lord Dunedin held:

"My Lords, I do not think it can be gainsaid that, *Esposito v. Bowden* (7 E. & B. 763) being, as I have already said, good law, then, IF THERE ARE DUTIES WHICH REMAIN UNAFFECTED BY THE SUSPENSORY CLAUSE, AND THESE DUTIES INVOLVE INTERCOURSE, THE CONTRACT MUST BE AVOIDED. In so far as the *Zinc Corporation Case* ((1916) 1 K.B. 541) laid down this proposition it was, in my opinion, right; and it is useless to examine the clauses in that case. It is necessary, however, to examine what the duties are under this contract. In order to make clause 12 intelligible it is necessary first to quote clause 2, which is in these terms: '2. One-fifth of the above 2,200,000 tons, viz., 440,000 tons, 15 per cent. more or less, is to be shipped in each year, during the period between 1st February and 30th November, and spread as nearly as sellers can arrange uniformly over this period. The sizes of cargoes for Rotterdam, Hamburg and Stettin shall be in sellers' discretion, but for other ports sellers shall arrange as far as possible for such reasonably sized cargoes, but not exceeding 3,000 tons, as buyers desire. About one-half of the ore is to be lumps and about one-half is to be fines, viz., ore which has passed through a half-inch square mesh screen'. Clause 12, so far as material, is as follows: 'The buyers are to declare in writing not later than 1st January of each year the total quantity of fines and lumps

separately which they desire delivered during that year, and what quantity of each size is to be delivered at each port'.

"The defendants contend that there is here no duty, but a mere option on their part. If they do not declare, all that ensues is that the ore falls to be divided equally between fines and lumps. I do not agree with the defendants' view. It is not alone the proportion as between fines and lumps but the total quantity that has to be determined, i.e., the decision as to the 15 per cent. more or less. Moreover, evidence has been given, which there is no reason to disbelieve, by which it is shown that from the sellers' point of view it is necessary to have these two matters fixed in order to settle the programme for working the mine during the ensuing year. And this yearly duty seems to me quite independent of delivery. I am therefore prepared to agree with the Court of Appeal on this ground of judgment. As regards clauses 18 and 19, I confess I am doubtful. Clause 18 is an arbitration clause. Now, though I agree with the learned judge who says that ARBITRATION CANNOT BE CONDUCTED WITHOUT INTERCOURSE, it seems to me that arbitration is not a necessary, nor indeed a usual, part of the performance at a time when *ex hypothesi* all deliveries under the contract are suspended. There is nothing for the time being to arbitrate about. So also as regards clause 19. This is a very special matter, providing, in the event of a Mr. Julius Ertel ceasing to be a member of the firm of Ertel Bieber & Co., that his place in active administration should be filled in a certain way. But Mr. Julius Ertel has not, so far as known, ceased to be a member of the firm, and active administration on the afore-mentioned hypothesis of suspended deliveries is at a standstill.

"My Lords, while the construction which I put on clause 12 affords, as I have said, sufficient ground to enable me to say that the judgment of

the Court of Appeal should be affirmed, IT IS, I THINK, DESIRABLE THAT OUR JUDGMENT SHOULD BE ALSO BASED ON RATHER BROADER GROUNDS. It is the more necessary to express an opinion on this point, because, as I shall hereafter have to say, I think the argument on clause 12 fails to be applicable in the two other cases which your Lordships will presently consider.

"My Lords, I confess I cannot read clause 15 without coming to the conclusion that, although war is mentioned *eo nomine* in that clause, it is not war between Great Britain and Germany, with the legal consequences thereon ensuing, that is envisaged, but war between other Powers, of whom Great Britain or Germany may be one, and which acts as a practical impediment *via facti* in stopping the possibility of delivery. But it is not necessary, in my view, to decide this question, for the simple reason that the respondents seem to me to be involved in a dilemma. Either the war which is to suspend delivery does not include a war between Great Britain and Germany, in which case the clause does not apply, or if it does mean such a war, with the legal consequences following thereon, THEN, IN MY VIEW, THE CLAUSE IS VOID AS AGAINST PUBLIC POLICY. I apprehend that in saying this I am not inventing a new head of public policy. I respectfully subscribe to the remarks made on this subject by the Earl of Halsbury in *Janson v. Driefontein Consolidated Mines* (1902, A. C. 484, 491). I take my view of what is against public policy from what has been said in a series of cases which have certainly become the law of England.

"Let me revert to the leading cases which I have already cited. The case of *The Hoop*, (1 C. Rob. 196) was a case where the goods from an enemy country, which had been consigned to British subjects and under contract became his property, were confiscated by capture by a British ship. The contract with the enemy subject by which the property

in the goods passed was made *pendente bello*. The ground of judgment was that all trading with the enemy is unlawful at common law as against public policy. Why? Not because of the terms of the particular contract, but because contract in general might enhance the resources of the enemy or cripple those of the subjects of the King.

"The case of *Furtado v. Rogers* (3 Bos. & P. 191, 198, 199) advanced the application of the rule a step further. Here the contract, which was one of insurance to indemnify for losses by war, was entered into when the countries were at peace. It was held that to allow such a contract, if war meant war between the insurer's country and this country, was unlawful. The ground on which this is put is very important. 'We are all of opinion', said Lord Alvanley, 'that on the principles of the English law it is not competent to any subject to enter into a contract to do any thing which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by Act of Parliament. It is admitted that if a man contract to do a thing which is afterwards prohibited by Act of Parliament, he is not bound by his contract. This was expressly laid down in *Brewster v. Kitchell*, (1697) 1 Salk. 198."

After considering other authorities and *Esposito v. Bowden*, Lord Dunedin laid down the following rules:

"From these cases I draw the conclusion that upon the ground of public policy the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which (1.) gives opportunities for the conveyance of information which may hurt the conduct of the war, or (2.) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law. I do not quote the recent

dicta of learned judges in the cases already cited of *Porter* (1915) 1 K. B. 857, *Robson* (1915) 2 Ch. 124, and *Zinc Corporation* (1916) 1 K. B. 541, because, although they are to the same effect and I agree with them, the recent cases are in one sense submitted in this case to the review of your Lordships' House.

"Let me now apply this rule to clause 15 on the hypothesis that it does suspend delivery during the war. But for it the contract would immediately end, by it the contract is kept alive, and that not for the purpose of making good rights already accrued, but for the purpose of securing rights in the future by the maintenance of the commercial relation in the present. It hampers the trade of the British subject, and through him the resources of the kingdom. For he cannot, in view of the certainly impending liability to deliver (for the war cannot last for ever), have a free hand as he otherwise would. He must either keep a certain large stock undisposed of, and thus unavailable for the needs of the kingdom, or, if he sells the whole of the present stock, he cannot sell forward, as he would be able to do if he had not the large demand under the contract impending. It increases the resources of the enemy, for if the enemy knows that he is contractually sure of getting the supply as soon as war is over, that not only allows him to denude himself of present stock, but it represents a present value which may be realized by means of assignation to neutral countries.

"For these reasons I come to the conclusion that clause 15 is void as against public policy and cannot receive effect. Without clause 15 there is an obvious necessity for intercourse, and the contract is therefore avoided as a whole. I am of opinion that the appeal should be dismissed with costs."

So in the case at bar, to hold that the contract in question prevented the seizure of the stock belonging to alien

enemies, would tend "to increase the resources of the enemy" and would cripple the resources of American citizens. If the contract were to be upheld, if it were to be kept alive, for the purpose of securing the rights of the Leipzig company in the future, it would hamper the rights of the Alien Property Custodian. It would increase the resources of the enemy by destroying the right of seizure by the Alien Property Custodian of the enemy-owned stock, leaving open the possible retention of the control of the New York company which is burdened with a five-year voting trust which will outlast the war.

Lord Atkinson also delivered a special opinion in the *Rio Tinto* case (1918) A. C. 275-280. From his opinion it appears that anything that MIGHT involve "communication" is illegal. Referring to the decision of Sankey J. and the Lords Justices of the Court of Appeal, Lord Atkinson said:

"I agree with them in thinking that the terms of this second agreement required that, in order to carry out the commercial transaction which was its subject-matter, FREQUENT COMMUNICATIONS touching its details should necessarily take place between the appellants and respondents, and, if that be so, it is well established by many authorities that those COMMUNICATIONS would, under the circumstances, be illegal, and would vitiate and make void the contract that involved and required them. It is only necessary to refer to *The Hoop*, 1 C. Rob. 196, *Potts v. Bell*, 8 T. R. 548, *Esposito v. Bowden*, 7 E. & B. 763, and *Janson v. Driefontein Consolidated Mines* (1902), A. C. 484, as authorities on the point.

"THE ILLEGALITY OF THESE COMMUNICATIONS DOES NOT IN THE SLIGHTEST DEGREE DEPEND ON THE TRIVIALITY OF THE BUSINESS DETAILS COMMUNICATED. The danger to the State involved in them lies probably to the greater extent in this, that, if permitted, they would afford easy opportunities for the communication of information most useful to the hostile belligerent State, and therefore injurious to the

State of which the person making the COMMUNICATION was a subject. In *Potts v. Bell*, 8 T. R. 548, 555, Sir John Nicholl, in an argument approved of, and indeed apparently adopted, by Lord Kenyon and the Court, put this objection most forcibly. And the recent decisions in the cases of *The Panaricillos* (1915), 138 L. T. Journ. 484, and *Robson v. Premier Oil and Pipe Line Co.* (1915), 2 Ch. 124, following the decisions of Sir William Scott in *The Hoop*, 1 C. Rob. 196, and in *The Cosmopolite* (1801), 4 C. Rob. 8, show that the prohibition, at common law, extended to intercourse of all kinds which could tend to the detriment of this country or the advantage of the enemy.

"Owing to some observations which were made in argument, it is, I think, well to point out that the illegality of any transaction as amounting to trading with the enemy does not at all depend upon whether it is profitable, either to the British citizen or to the enemy subject who engages in it, or the contrary. Trading with the subject of an enemy State, or with a person resident in that State, is ASSUMED TO BE BENEFICIAL TO THE ENEMY STATE. IT HELPS THE ENEMY'S TRADE AND COMMERCE, AND SO FAR DEFEATS ONE OF THE OBJECTS OF THIS COUNTRY IN GOING TO WAR, WHICH IS TO CRIPPLE THAT COMMERCE, IN ORDER TO FORCE THE ENEMY TO COME TO PEACE. It may be that the trading would benefit this country as well; that, however, is not for the individual trader to decide. It is for the State to decide, and the State can, if it so desires, grant licenses to trade to particular persons or for particular commodities and so secure that benefit. In *Ex parte Baglehole* (1812), 18 Ves. 525, 529, Lord Eldon said: 'Though it might be a very beneficial act in a subject of this country to purchase corn in France and send it to this country at the present period, yet, if he was there without license to trade, to reside and trade, such commerce would be clearly illegal.' The statement was, I presume, based on

this ground, that, though beneficial to this country, it would also, presumably, be beneficial to the then enemy, France, and, because of this, necessarily detrimental to the higher interests of England. Lord Alvanley, in the well-known passage of his judgment in *Furtado v. Rogers*, 3 Bos. & P. 191, 198, 199, lays it down 'that on the principles of the English law it is not competent for any subject to enter into a contract to do any thing which may be detrimental to the interest of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by Act of Parliament.' Lord Alvanley was no doubt in that case dealing with the case of a policy of insurance, but he laid down this principle in general terms, and his decision was approved of without qualification in *Janson v. Driefontein Consolidated Mines* (1902), A. C. 484, 506. Lord Alvanley further says: 'But it is said that the action' (i. e., the action to recover on the policy) 'is suspended, and that the indemnity comes so late that it does not strengthen the resources of the enemy during the war. THE ENEMY HOWEVER IS VERY LITTLE INJURED BY CAPTURES FOR WHICH HE IS SURE AT SOME PERIOD OR OTHER TO BE REPAID BY THE UNDERWRITER.' This remark applies to the suspensory clause in the special agreement.

"I think, however, that in this case a wider and equally important question arises for determination. Scrutton L. J. refers, at some length, to it in his judgment. It is this, whether the outbreak of the war does not by itself make illegal the contract contained in the 15th clause of the second agreement. That clause provides that if the respondents should be prevented, owing to strikes, war, or any other cause over which they have no control, from shipping from Huelva, or delivering to the appellants the ore purchased, the obligation of the respondents to ship and deliver the same during the continuance of the impediment and for a reasonable time thereafter to allow the respondents to re-

some shipments and deliveries should be suspended. There is a corresponding provision that should war or any other cause over which the appellants or their clients have no control prevent them from receiving the ore, the obligation to receive under the contract should be reduced in proportion or suspended during the continuance of the impediment and a reasonable time thereafter to allow the appellants time to recommence receipts. It will be observed that this clause only deals with the shipment, delivery, and receipt of the ore, and save so far as the suspension of those things may affect the other clauses of the contract leaves those latter untouched. Many of the obligations these clauses impose still rest upon the parties, and it is because of this result that I concur in the conclusion at which the Court of Appeal have arrived. As regards this 13th clause, it is necessary in the first place to ascertain what is its precise meaning. Do the words 'war or any other cause over which the sellers have no control' cover and embrace the present war between Great Britain and Germany? IF THEY DO NOT EMBRACE IT THE AGREEMENT IS CLEARLY ILLEGAL AND VOID, INASMUCH AS IT WOULD BIND A BRITISH SUBJECT TO DELIVER GOODS TO AN ALIEN ENEMY IRRESPECTIVE OF THE EXISTENCE OF THAT WAR JUST AS IF THE TWO COUNTRIES WERE AT PEACE. In my view the clause clearly covers the existing war between this country and Germany though it is not confined to it. Next, does the prevention by war mean not only prevention by physical, warlike operations, such as capture and blockade, for instance, but also prevention by the legal principles applicable to trading during a state of war—the prohibition of English subjects from engaging in commercial intercourse with alien enemies? I see no reason whatever for confining these words to the first of the results of a state of war. I think they include both results. Next, what is the meaning of the words 'the obligation to deliver shall be sus-

pended? Do they mean that the entire amount of ore contracted to be delivered, 2,200,000 tons, 15 per cent. more or less, are to be delivered as soon as the war shall have ended or within a reasonable time thereafter, or do they mean that the respondents are relieved for ever from the obligation to deliver each year while the war lasts the 440,000 appropriate to that year, so that at the end of the war they shall only be obliged to deliver the latter amount for every year between the termination of the war and November 30, 1919? If the first, the agreement purports to secure, as far as an agreement of the kind with a company whose solvency has not been impeached can secure, great and immediate benefits to the appellants, and through them for their country. IT WILL HAVE SECURED FOR THEM THE CERTAINTY THAT THEIR TRADE AND COMMERCE WITH THE RESPONDENTS WILL BE RESUMED IMMEDIATELY ON THE TERMINATION OF THE WAR, that a vast stock of ore will then or within a reasonable time thereafter be available for them, ready for delivery to them or their order, ENABLING THEM DURING THE WAR TO MAKE FORWARD CONTRACTS WITH THEIR OWN CUSTOMERS, AND TO RAISE MONEY ON THE SECURITY OF THIS AGREEMENT, AND THUS TO KEEP ALIVE TO A CONSIDERABLE EXTENT DURING THE WAR THEIR TRADE AND COMMERCE TO THEIR OWN GAIN, with the resulting benefit to their country, and at the same time work to the detriment of England in that it would prevent this vast mass of ore being made available for English manufacture. Well, if it mean the second, benefits the same in kind, though less in degree, would be accrued to the appellants and their country, and the same injury in kind, though less in degree, inflicted on the respondents and their country. If this clause 15 were deleted from the agreement it could not, I think, be contended for a moment that the contract was not illegal and void. I cannot think that a

clause which does not deprive the appellants of the full enjoyment of all benefits of the contract, but merely postpones that enjoyment for an uncertain time, leaving it ultimately certain and secure, can change the nature of the contract and make it legal and binding. On this ground, therefore, as well as that I have first dealt with, I think this agreement has by the outbreak of the war with this country and Germany become illegal and void, that the decision of the Court of Appeal was right and should be upheld, and this appeal be dismissed with costs."

The contract in the case at bar binds a New York company, a citizen of the United States, to pay money to an alien enemy, "irrespective of the existence of the war just as if the two countries were at peace." That tends to increase the resources of the alien enemy. It does not EVEN ON ITS FACE pretend to be suspended during the war. Although obviously made in contemplation of the war, and obviously a clumsy effort to defeat the right of capture of the United States on the outbreak of war, it yet contained no provision that its terms or any of them should be suspended during the war. Hence it contemplated things to be done *during the war*, and therefore became illegal on the outbreak of war.

Lord Waddington also delivered a separate opinion (1918) Appeal Cases, 280-284. He held that if the suspensory clause be construed as covering or providing against the effects of war between England and Germany, then it was void as contravening the well-known rule of public policy. He said:

"It is not permissible by English law for a subject of the Crown to contract with a foreigner that in case of war between this country and the State of which the foreigner is a subject, the latter shall be indemnified against or be relieved from or receive compensation for a loss which he would otherwise suffer by reason of the war or of anything done in the prosecution of the war. This is the principle which underlies Lord Alvanley's judgment in

Furtado v. Rogers, 3 Bos. & P. 191. It is true that in that case the actual decision turned on the true construction of the contract, which was for insurance against capture at sea. It was held that such a contract impliedly excluded capture by His Majesty's naval forces. But the really important point is the reason for this conclusion. It was because otherwise the contract would have been altogether void as against the public policy of the realm. In *Janson v. Driefontein Consolidated Mines* (1902), A. C. 484, the same principle is recognized, though the decision itself turned on different considerations. An attempt was there made to extend the principle to a seizure of goods of the insured by his own Government during peace but at a time when war was anticipated, but this attempt failed."

Lord Waddington held that the respondents were therefore bound to deliver to the appellants in the year 1914 the undelivered portion of ore contracted to be sold, and said: "The effect of the war on this liability was clearly to abrogate it altogether. It could not be performed without trading with the enemy. The war made it illegal. The case of *Esposito v. Bowden* is clearly in point and the decision appealed from is right." (1918) Appeal Cases, 282.

Passing to the second contract, Lord Waddington held as follows:

"In the view I take of the suspensory clauses it is unnecessary to consider this point. I prefer to rest my opinion on the broader ground that the suspensory clauses cannot, for the reasons I have given, apply to the present war, and upon the consequences which necessarily follow, if they do not apply."

Lord Sumner also delivered a separate opinion (1918) A. C. 284-291. Among other things he said:

"The rule of law which forbids a British subject to trade with the King's enemies is very ancient. Its effect upon trading contracts which, like the present, are executory on both sides was already

well settled by the middle of the last century. *Esposito v. Bowden* (7 E. & B. 763) finally answered the last of the questions which had been raised down to that time. The Court of Queen's Bench held that the charter was only dissolved on the outbreak of war if it could not possibly be performed without trading with the enemy, and in supporting this decision in the Court of Exchequer Chamber, Mr. Manisty argued that the mere declaration of war did not rescind the executory contract in question; 'it only suspends it, and renders it illegal where it cannot be performed in any legal manner'. The Court of Exchequer Chamber first of all made it plain that the question was a general one, not dependent on the mere possibilities of the particular case, and that the occlusion of Odessa to Englishmen generally, by force of law, for an indefinite and presumably protracted time, could not be done away with by suggesting some possibility of a British ship loading cargo in that enemy port while somehow or other avoiding all contact with any enemy. Secondly, the Court decided in express terms that illegality does not suspend; it dissolves. What the law forbids is impossible of performance to those who owe obedience to that law, and this higher public obligation discharges any private obligation to the contrary.

"BEFORE 1914 I DO NOT THINK THAT THE THEORY UPON WHICH THIS DISSOLUTION IS HELD TO OCCUR HAD BEEN THE SUBJECT OF ACTUAL DECISION. The common law rule is much older than the development of overseas commerce, and during last century the practical question raised was 'how does the rule affect commercial contracts', and not 'how is that effect to be stated and justified in terms of general jurisprudence'. It occurred, however, within recent years to some ingenious mind, OBVIOUSLY WITH THE DESIRE TO PREFER PRIVATE COMMERCE TO PUBLIC PRINCIPLE, that a clause of suspension might secure to particular contracts that

continued existence during war which the Exchequer Chamber had denied generally. To negotiate with an enemy towards the end of a war for the conclusion of a contract to sell and deliver goods as soon as peace should be signed would be a crime, but to stand bound to do so by a contractual tie throughout the war might possibly be lawful, if only the contract was concluded before the war with a provident eye to the possibility of its occurrence. Hence the disputes of which the present appeal is a type. Does a suspensory clause oust the application of the general rule?"

Lord Sumner then stated the following principles regarding public policy:

"My Lords, public policy, though a clue to the principle involved, is not in itself the key to the difficulty. The rule as to the dissolution of trading contracts on the outbreak of war, when they are executory on both sides, is said to exist for the purpose of assisting to cripple the enemy's commerce and of closing an avenue to illicit and traitorous correspondence. These are, however, the practical advantages of the rule, not its basis in theory. Courts of law are not at liberty to apply the rule and dissolve a contract merely because they think its continuance disadvantageous to this country's belligerent policy. I think that public policy is a separate ground for deciding this particular case, but so far as trading with the enemy goes, I wish to keep within what I conceive to be implicit in the old decisions upon the question.

"My Lords, if upon public grounds on the outbreak of war the law interferes with private executory contracts by dissolving them, how can it be open to a subject for his private advantage to withdraw his contract from the operation of the law and to claim to do what the law rejects, merely to suspend where the law dissolves? The prohibition, which arises at common law on the outbreak

of war, has for this purpose the effect of a statute. The choice between suspending and discharging the contract on the outbreak of war was quite deliberately made, and if occasionally the contract is said to be only suspended, or a Court refuses to dispose of a case on the ground of dissolution alone, this only brings into relief the fact that by an overwhelming preponderance of authority such trading contracts have been held to be dissolved on the outbreak of war. An appearance of authority to the contrary is sometimes found to be in truth a misreading of the language of a decision. Thus Lord Halsbury's use of the word 'affected' in *Janson v. Driefontein Consolidated Mines* (1902, A. C. 484, 493) is due to the fact that, by consent, the case had been tried as if the then war had terminated. The question was one of a cause of action, which had accrued one day before the outbreak of war and thereupon had been suspended as to the remedy only. Of course, if the war was treated as over, neither contract nor remedy was 'affected'. The policy was not an executory contract after war broke out so far as concerned the gold seized at Vereeniging at all. There can be no doubt that the matter must have been considered. To many people suspension seems to have much to recommend it. Freedom of contract is challenged less; the sacrosanctity of commerce is respected more. The Courts could not have adopted the rule of dissolution unless they had reasoned that suspension would be inconsistent with this principle of the law of contract. I will quote the language of Willes J. in *Esposito's Case* (7 E. & B. 763, 792): 'In all ordinary cases, the more convenient course for both parties seems to be that both should be at once absolved, so that each, on becoming aware of the fact of a war, the end of which cannot be foreseen, making the voyage or the shipment presumably illegal for an indefinite period, may at once be at liberty to engage in another adventure without wait-

ing for the bare possibility of the war coming to an end in sufficient time to allow of the contract being fulfilled, or some other opportunity of lawfully performing the contract perchance arising. The law upon this subject was doubtless made, according to the well-known rule, to meet cases of ordinary occurrence'. To his mind I think it is clear that the RULE WAS ONE MADE TO PROVIDE CERTAINTY AT THE OUTBREAK OF WAR, WHERE IN ITSELF EVERYTHING IS UNCERTAIN; THAT IT WAS ONE MADE TO APPLY GENERALLY, although taking its form from the needs of ordinary cases; and that, for the purpose of applying it, the case must be looked at as things stood when war broke out, and not as they were ascertained to be or as they ultimately happened during the interval before the trial of the action.

"In the abstract discharge of a contract by reason of the outbreak of war between the countries to which the parties respectively belong should be effected simply by operation of law independently of their arrangements. THE RULE SETS THE PUBLIC WELFARE ABOVE PRIVATE BARGAIN. It does so for the safety of the State in the twofold aspect of enhancing the nation's resources, and crippling those of the enemy. To hold that the parties may be allowed to make their own arrangements for attaining these ends and to set their private judgment, not untinged by considerations of their future interest, above the prescriptions of the public law would be anomalous. To say that for the purpose of preventing such intercourse the law generally determines stipulations which involve commercial intercourse between enemies, but when the parties have agreed not to hold any such intercourse is content to leave it to them, would indeed be rash. True, there is the criminal law against holding commercial intercourse with the enemy, but the offence is one not always easy to detect. In a matter of national safety the State cannot surely rely on the bare integrity and good

faith of persons whose commercial interest may so strongly conflict with their public duty."

Lord Sumner then considered (1918) A.C. 288, the decisions in *Raposo v. Bowden*, and the decision by Justice Story in *The Rapid*, (1812, 1 Gall. 295, 309), and then passed to a consideration of the decision of Chancellor Kent in *Griswold v. Waddington* (1819, 16 Johnson, Sup. Ct. New York, 438, 489) and stated that each instalment could NOT have been treated as if it were the subject of a separate contract, and that "instalments, which in point of date might fall to be delivered after the conclusion of peace", cannot be severed from the rest.

So in the case at bar. It cannot be argued that the war might have been over before the first instalment was payable. The plaintiff cannot have the benefit of any such presumption. The rule is that the whole contract, so far as it is mutually executory, is dissolved. The court will not commit the absurdity of making the assumption that war would be over before the first payment was to be made.

As to that Lord Sumner said:

"The whole contract so far as it is mutually executory is dissolved. Again, the suspension of the right of suit in the case of enemy nationals, for causes of action already accrued, until the conclusion of peace is not an argument in favour of substituting suspension by agreement for discharge by operation of law. Whether it sounds in debt or in damages such a cause of action implies a present obligation to pay simultaneous with its coming into existence. Suspension of the remedy implies no continuance of the contract during the war, but only a recognition of its existence before the war as the basis or origin of a right, which, when it has accrued, is a chose in action, a form of property.

"My Lords, in my opinion discharge by operation of law upon the outbreak of war operates upon trading contracts as a class by reason of their common characteristic of international intercourse, and is

not prevented by special stipulation between the parties. It is not necessary for present purposes to define the term 'trading' or the word 'enemy'. The class affected is not such contracts as contemplate a continuance of trading during war, but trading contracts as such, which are in being as mutually executory contracts at the outbreak of war, AND WOULD IN ORDINARY COURSE AND CIRCUMSTANCES IMPORT COMMERCIAL INTERCOURSE. 'War', says Lord Lindley in *Janson's Case* (1902, A. C. 509) " . . . prohibits all trading with the enemy except with the Royal license, and dissolves all contracts which involve such trading'. As the present case is one of such executory trading, I think the rule that such contracts are discharged upon the outbreak of war must apply".

Lord Sumner then dealt with an independent ground as follows,—a ground which seems to have a bearing on the facts in the case at bar. He said:

"There is another and independent ground on which this appeal may be disposed of. 'We are all of opinion', says Lord Alvanley, C. J. in *Furtado v. Rogers*, speaking of a commercial contract operating after the outbreak of war though made before it, 'that on the principles of the English law it is not competent to any subject to enter into a contract to do any thing which may be detrimental to the interests of his own country'. If the principle of this decision be applied to the construction of these contracts, the suspensory clauses must be read as if they contained the words 'an Anglo-German war always excepted'; in that case, under *Esposito v. Bowden*, the contracts became discharged. If on the other hand the above passage be applied and the suspensory clauses be read as the appellants contend, then in my opinion the contracts never were valid. THEY WERE VOID FROM THE OUTSET ON GROUNDS OF PUBLIC POLICY. It is incidental to the conduct of

war that the Sovereign should be free to bring pressure to bear on the enemy by crippling his commerce and exhausting his resources; it is incidental to the conduct of war that the resources of the Sovereign's subjects should be free to be employed lawfully in preserving and extending the resources of the realm. IT IS FURTHER IMPORTANT TO ITS CONDUCT THAT THERE SHOULD BE NO CLOG ON THE SOVEREIGN'S POWER TO IMPOSE HIS WILL ON THE ENEMY THROUGH FEAR OF THE INCLUSION OF UNFAVORABLE ECONOMIC CONDITIONS IN ANY TREATY OF PEACE. The present contract involves large sums. Your Lordships were told that its future performance represents 10,000,000*l.* to the buyers, and it well may be so. Multiply these contracts, say, hundredfold—no extravagant hypothesis—and what is the result on the conduct of the war? If these suspensory clauses are valid, the enemy knows three things: the first, that he may expend certain of his material resources without stint, for his right to replenish them in enormous quantities is assured AT OR SHORTLY AFTER THE CONCLUSION OF PEACE; the second, that the present employment of these raw materials as British resources during the war whether in the way of commerce or in the actual supply of combatant needs, is hampered by the existence of huge future commitments, performable at an uncertain and perhaps not distant date; THE THIRD, THAT HE MAY BE BEST ASSURED THAT THE IMPOSITION OF COMMERCIAL DISADVANTAGES IN THE TREATY OF PEACE IS PRO TANTO NEUTRALIZED, AND THAT MILITARY RESISTANCE MAY BE PROLONGED IN PROPORTION. I think it plain, as it was thought by the Courts below, that such suspensive clauses as are in question here tend to defeat the successful conduct of the war on His Majesty's part, and are therefore contrary to public policy and render the contracts void.

"My Lords, I do not forget how limited is the extent to which Courts of law can guide their de-

cisions by their views of public policy, nor am I insensible to the fact that in giving circumstances, perhaps in circumstances as they are now, more profits may be lost by British than by enemy subjects, if all mutually executory trading contracts are discharged on the outbreak of war. How this may be, in my opinion a Court of law is not competent to inquire or decide. Is it to be guided by the sums involved, the profits in prospect, or the economic value of the particular commodity to the general commerce and industry of the nation? Is it to call upon private parties to give evidence of the existence of contracts (probably jealously concealed) to which others are parties and they are strangers? IT IS FOR THE EXECUTIVE TO INVESTIGATE AND FOR THE LEGISLATURE TO PROVIDE FOR SUCH POSSIBILITIES. ALL THAT JUDGES CAN DO IS TO ADHERE TO ESTABLISHED RULES, TO ASCERTAIN THEIR LOGICAL FOUNDATIONS, AND TO APPLY THEM IMPARTIALLY TO DISPUTED CASES."

If the contract of February 20, 1917 was not abrogated on the outbreak of the war, then it either involved and required present trading with and the payment of a large sum of money to the enemy or was suspended during the war. If the parties to the contract had put in a suspensory clause, they would have done a perfectly logical thing. But they did not. They thought they were accomplishing the same thing by putting the five years voting trust upon the stock of the New York company, thus clouding its title and preventing a sale. But if they had put in a suspensory clause, the contract would have been void from the outset on the grounds of public policy, under the authority of the *Rio Tinto case*.

In the second action, *Dynamit Actien-Gesellschaft v. Rio Tinto Company*, the defendant showed that the contract was a contract made in Germany, in the German language, by a German agent of the English principal. There was no proof of what the German law was. It was held by Lord Dunedin that the fact of the contract being a German

contract had no bearing upon the question. He assumed that the question of interpretation was settled in accordance with the German law, and then said that if the contract continued to be carried out according to its terms there would necessarily be commercial intercourse. "But the German courts could decide that the suspensory clause stopped such intercourse, and either did or did not leave other duties involving intercourse. If they decided it did not, then they might decide that the existence of the suspensory clause and the continuance of the contract after the war were not against German public policy. But they could not determine in such a way as to bind an Englishman in an English Court that such a clause with these effects was not against English public policy and therefore binding on an English subject."

The decision of Lord Atkinson (1918) A. C. 295-301 comes to the same conclusion as the opinion of Lord Dunedin, but it contains some excellent discussions of public policy.

Lord Atkinson said:

"I think the above cited authorities clearly establish that, even if it were so, a British subject, once war breaks out, is bound not to trade with Great Britain's German enemies, that contracts binding him to do so become as to him illegal and void, and that the Courts of this country will not enforce them. The rights and liabilities of British subjects depend in these matters for their legality upon what British laws and British policy demand, and not upon what the law or public policy of Germany prescribes in reference to commercial contracts made with its subjects".

Lord Waddington laid down the following excellent rules as to public policy:

"Whenever the Courts of this country are called upon to decide as to the rights and liabilities of the

parties to a contract, the effect on such contract of the public policy of this country must necessarily be a relevant consideration. Every legal decision of our Courts consists of the application of our own law to the facts of the case as ascertained by appropriate evidence. One of these facts may be the state of some foreign law, but it is not the foreign law but our own law to which effect is given, whether it be by way of judgment for damages, injunction, order declaring rights and liabilities, or otherwise. As has been often said, private international law is really a branch of municipal law, and obviously there can be no branch of municipal law in which the general policy of such law can be properly ignored. If the policy of our law renders it unlawful for a subject of the Crown to contract with a foreigner that if war break out between this country and the State of which the foreigner is a subject the latter shall be indemnified against or be relieved from or receive compensation for a loss which he would otherwise incur, no subject of the Crown can be allowed to evade the rule by entering into such a contract out of the jurisdiction and stipulating expressly or impliedly that the contract shall be governed by a foreign law. The late Mr. Westlake sums up the law on this point in the following proposition (*Private International Law*, 4th ed., s. 215): 'Where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here notwithstanding that it may have been valid by its proper law.' There is ample authority for this proposition".

II

Defendants' Exhibit F

HEYN & COVINGTON
60 WALL STREET
NEW YORK

February 9, 1918.

Alien Property Custodian,
Division of Corporations,
36th & P Sts., N. W.,
Washington, D. C.
Attention of Judge J. Davis Brodhead and
Mr. Andrew B. Duvall.

BOTANY WORSTED MILLS
STOEHR & SONS INC.

Gentlemen: —

At the conclusion of our conference last Wednesday, February 6th, 1918, it was arranged that we put in written and summary form the various facts and statements made and hereby take pleasure in doing so.

AS TO WHERE THE CONTROL OF THESE COMPANIES IS:

As will be pointed out hereafter more in detail and as stated by us in our various conferences, CONSIDERABLY MORE THAN A MAJORITY CONTROL OF THESE COMPANIES IS IN ALIEN ENEMIES UNDER THE ACT. The exact figures and stockholdings are stated more at length below.

BOTANY WORSTED MILLS OF PASSAIC, N. J.:

The Botany Worsted Mills was organized in 1889 under the laws of the State of New Jersey. It was founded

by Mr. Eduard Stoehr of Leipzig, Germany, who is the head of the Stoehr family. He was also the founder of Stoehr & Co., a German corporation, which had been organized in 1880 and was engaged in Leipzig, Germany, in the manufacture of yarns and textile goods.

BYLAWS AND CERTIFICATE OF INCORPORATION:

We submit herewith a certificate of incorporation of the Botany Worsted Mills; also a copy of its bylaws which have been substantially in this form since its organization, with various amendments as to details, the last amendment having been made in 1913.

CAPITAL STOCK OF BOTANY WORSTED MILLS:

Present amount \$3,600,000 all common stock, consisting of 36,000 shares; par value \$100 each. There have been various increases of the original capital stock (which was \$1,100,000) since the organization in 1889, the last increase to the present amount having taken place in 1908.

Botany Worsted Mills is engaged in the manufacture of worsted woolen and other yarn and textile goods. Its plant is situated in Passaic, New Jersey and the Company has about 6500 employees.

NUMBER OF DIRECTORS:

The bylaws provide that the number of directors shall not be less than seven nor more than eleven (bylaws, Article V, par. 2). The number of directors for any year is determined by the stockholders at their annual meeting (bylaws, Article V, par. 2). At the March, 1917 meeting they determined that there should be 10 directors. At the present time there are eight directors, whose names, residences, positions which they now occupy in the Company and the length of time of their connection with the Company are as follows:

PRESENT BOARD OF DIRECTORS (8 DIRECTORS WITH 2
VACANCIES) :

Thomas Prehn, of Passaic, New Jersey, president, connected with the Company since 1889.

Hans E. Stoehr, of New York City, treasurer, connected with the Company since 1902.

Ferdinand Kuhn, of Bernardsville, New Jersey, vice president, connected with the Company since 1891.

Geo. G. Roehlig, of Passaic, New Jersey, superintendent and vice treasurer, connected with the Company since 1889.

Max W. Stoehr, of Passaic, New Jersey, secretary, connected with the Company since 1903.

Alfred de Liagre, of New York City, executive head of New York office and of the general sales department, connected with the Company since 1903.

Otto Kuhn, of Passaic, New Jersey, head of the woolen department, connected with the Company since 1905.

Camille Mehl, of Passaic, New Jersey, head of the yarn department, connected with the Company since 1915.

UNUSUAL NATURE OF THE DIRECTORSHIP OF THIS COMPANY :

The nature of the directorship of the Company has from the date of its organization been exceptional and different from that of most American companies in that this Company's Directors are actively engaged in the business and occupy responsible positions as officers or heads of departments. This has been the policy of the Company from the date of its organization, it being the purpose of the founder, Mr. Eduard Stoehr, that the directors should be real directors actually and personally interested in the business and giving their time and attention to it. The reward of the directors for the success of their work was to be accordingly. It will be noted that the directors in accordance with the provision of the bylaws receive as their compensation a sum equal to 32% of the profits after deducting a 6% dividend to the stockhold-

ers and 5% for reserve (Article 21, par. B, page 15). This provision of the bylaws has been in force with immaterial variations from the date of the organization of the Company in 1889. The variations relate to the percentage which was 25%, later 40% and then 32%.

It will be noted that there are now two vacancies in the Board. At the annual meeting in March, 1917, ten directors were elected, being the gentlemen above mentioned and Eduard Stoehr of Leipzig, Germany, and Geo. Stoehr, of Leipzig, Germany. In the spring of 1917 after the declaration of war, the Board pursuant to Article V, par. 6 of the bylaws, declared two directorships vacant because of the disability of Eduard Stoehr and Geo. Stoehr, due to the state of war and said vacancies have not been filled.

It will also be noted that all of the present directors and officers are residents of the United States.

ANNUAL MEETING OF BOTANY.

The annual meeting of the stockholders of the Company is held on the third Tuesday of March (Article XIII, par. I of the bylaws), the next annual meeting taking place on March 19, 1918.

STOEHR & SONS INC., NEW YORK CITY.

This is a New York corporation, organized in February, 1917, which is the successor to Stoehr & Sons, a partnership in New York City, which consisted of Eduard Stoehr, of Leipzig, Germany, and his three sons, H. E. Stoehr, of New York City, M. W. Stoehr, of Passaic, New Jersey, and Geo. Stoehr, of Leipzig, Germany.

CERTIFICATE OF INCORPORATION AND BYLAWS.

A copy of the certificate of incorporation and of the bylaws of this Company are submitted herewith.

CAPITAL STOCK OF STOEHR & SONS INC.:

Amount \$250,000, consisting of 2500 shares, par value \$100 each.

The business of the Company,—like that of its predecessor, the partnership of Stoehr & Sons,—is dealing in wool; part of its funds were used to help finance the operations of Botany and it also made investments in other American enterprises.

THE IMMEDIATE OCCASION for the organization of the corporation in February, 1917, was this: It was assumed that if there was a declaration of war between the United States and Germany, the partnership would probably have to cease, being dissolved by reason of the alien enemy character of Eduard Stoehr, the father, and Geo. Stoehr, the brother, the results of such dissolution being of course obviously unfortunate and conceivably disastrous.

The partners retained the same proportional interest in the corporation as their interest in the partnership, namely, Eduard Stoehr, the father, 1875 shares, Geo. Stoehr, the brother, 222.21 shares (being represented by trust certificates held by M. W. Stoehr for his father and brother)—in other words somewhat more than 4/5ths interest in parties resident in Germany.

OFFICERS AND DIRECTORS OF STOEHR & SONS INC.:

The certificate of incorporation and bylaws of the company provide for four directors. They are as follows:

Hans E. Stoehr, President,
Geo. G. Roehlig, Vice President,
Max W. Stoehr, Secretary and Treasurer,
Alfred de Liagre, Ass't. Secretary and Ass't. Treasurer.

It will be noted that these directors and officers are the same gentlemen mentioned above as directors and officers etc. of Botany Worsted Mills and that all of them are residents of the United States.

As has been pointed out, the founder of the Botany Worsted Mills was Eduard Stoehr. As he is advanced in age (being 72 years) most of the active work during the past years has devolved on his sons. In this connection it may be stated generally that Eduard Stoehr, the father, and Geo. Stoehr, the brother, were in charge of the Stoehr interests in Germany, and H. E. Stoehr and M. W. Stoehr of the interests in the United States. H. E. Stoehr represented his father and also Stoehr & Company, the Leipzig corporation, in this country.

Stoehr & Co., the Leipzig corporation, is a German stock company with its plant near Leipzig, Germany. Eduard Stoehr occupied a position similar to that of a chairman of the Board of Directors and Geo. Stoehr the position of chief executive officer similar to president.

In February, 1917, the Board of Directors of Stoehr & Co. consisted of five members, viz: Eduard Stoehr, Hans E. Stoehr, Dr. Rosenthal, Paul Gulden and Carl Beckmann.

DETAILS AS TO STOCK CONTROL OF BOTANY WORSTED MILLS:

The following will show the stockholdings in Botany Worsted Mills:

Shares of 84 Alien Enemy Stockholders referred to in the list report made to the Alien Property Custodian by Botany Worsted Mills, Form No. 101, report No. 5263 (see typewritten list, Schedule 2, showing 10,700 shares in names of alien enemy stockholders from which are to be deducted 1205 shares referred to as having been purchased and paid for in 1916 by stockholders resident in U. S.).. 9,495

These 1205 shares were bought and paid for in 1916 by stockholders resident in the United States. But on account of interrupted communication the particulars as to the numbers of the certificates and the names of stockholders are incomplete (see report No. 5263, last page of Schedule 2).

The above mentioned 9495 shares include 2900 shares of Georg Hirsch, of Gera, Germany, standing in the name of Thomas Prehn (see report made by Thomas Prehn to the Alien Property Custodian. The report number and trust number of this report we do not know).

The above 9495 shares also include 1400 shares of Friederich Arnold, of Greiz, Germany, standing in the name of Thomas Prehn (see report by Thomas Prehn No. 3052, trust No. 468).

Shares referred to in report No. 5263 (see last paragraph of typewritten list of Schedule 2, and also report No. 1869, trust No. 4017, Schedule 12, and a copy of contract annexed thereto. See also Schedule 2, last paragraph and Schedule 4 of report No. 5263). These shares were in the name of H. E. Stoehr and M. W. Stoehr, as trustees for said Stoehr & Co., the Leipzig corporation, the beneficial interest being in Stoehr & Co. 14,900

Regarding the contract for the purchase of said 14,900 shares by Stoehr & Sons Inc., from Stoehr & Co., of Leipzig, Germany, IT HAS BEEN FULLY EXPLAINED that the CONTROL OF BOTANY MIGHT BE IMPERILED BY A STATE OF WAR, because the voting right on stock of alien enemies or in which alien enemies had the beneficial interest (as was the case with said 14,900 shares) was doubtful under the decisions of the Courts, and if deprived of THE VOTING RIGHT, THE CONTROL OF BOTANY MIGHT BE LOST. This contract was made with REFERENCE TO THE CONTROL OF BOTANY AS BETWEEN ITS STOCKHOLDERS AND HAD OF COURSE NO REFERENCE TO THE STATUS OF SUCH CONTROL SO FAR AS THE ALIEN PROPERTY CUSTODIAN IS CONCERNED. *Such status is not affected whether such shares are in Stoehr & Co. the Leipzig corporation or in Stoehr & Sons Inc. the New York corporation. AS WE ALSO STATED VERBALLY THERE HAVE*

BEEN NO RESOLUTIONS OR OTHER CORPORATE ACTION BY STOEHR & Co., THE LEIPZIG CORPORATION, IN CONFIRMATION OF THIS TRANSACTION.

Additional shares belonging to Stoehr & Sons Inc. the New York corporation.....	5,685
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Other stockholders in the United States, including the 1205 shares referred to above	5,920
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TOTAL STOCK OF BOTANY	36,000.
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To summarize: While Botany is managed in this country, CONSIDERABLY MORE THAN A MAJORITY OF ITS STOCK IS CONTROLLED BY ALIEN ENEMY INTERESTS WITHIN THE MEANING OF THE ALIEN ENEMY ACT; THE TOTAL OF THE STOCK THUS CONTROLLED (DIRECTLY AND INDIRECTLY) BEING 30,080 SHARES.

In accordance with the suggestion of Judge Brodhead and Mr. Duvall, we have stated in the foregoing letter the substance of the information verbally stated by us and contained in the reports made to the Alien Property Custodian. Of course, if any further information is desired we shall be glad to furnish it.

AS TO FURTHER CONFERENCE.

We refer to the suggestion made by Judge Brodhead at our last interview regarding a future conference and shall be pleased to hear from you as to what date will be convenient to your office.

AS TO THE EXECUTIVE COMMITTEE.

In addition to the foregoing may we take the liberty of calling your attention to Article XXIII of the bylaws of Botany (last page) which provides for an executive committee? Through this committee effective control may be exercised over the affairs of Botany. The number of

its members could, if desired, be reduced to three and its powers extended and such other appropriate restrictions adopted as may be deemed advisable.

Yours very truly,

HEYN & COVINGTON
Counsel.

Enclosures 4.

The foregoing approved.

BOTANY WORSTED MILLS,
By HANS E. STOEHR,
TREAS.

STOEHR & SONS INC.
By HANS E. STOEHR,
PRES.

(The four enclosures in the above letter were (a) certificate of incorporation of the Botany, (b) bylaws of the Botany, (c) certificate of incorporation of the New York Company, (d) bylaws of the New York Company).

Defendants' Exhibit G was a carbon copy of Defendants' Exhibit F with the foregoing original signatures of Hans E. Stoehr both as Treasurer of the Botany Worsted Mills and as President of Stoehr & Sons, Inc. (page 223; folio 424).

With Defendants' Exhibit G, defendants offered in evidence the official receipt of the postmaster of New York of the registered letter enclosing the original of Defendants' Exhibit F.

With Exhibit G there was also offered in evidence the registered return receipt from the Alien Property Custodian in the official form (page 223; folio 424).

III

Defendants' Exhibit X

BOTANY WORSTED MILLS
PASSAIC, NEW JERSEY

February 5, 1918.

Dear Mr. Heyn:

I wish to thank you for the *satisfactory message*, which you gave me over the telephone, reporting about your interview at the Department of the Alien Property Custodian. I am sorry that the permit for my coming to Washington was not granted. It might have helped to straighten out any questions. At the same time the evidence and information, which you have, may be sufficient to enable you to bring this matter to a *satisfactory conclusion*.

Herewith I am enclosing another letter, containing the information asked for in regard to the holdings of stock in the Botany Worsted Mills, and Stoechr & Sons Inc. In addition I give you a list of the stockholders of the Botany Worsted Mills as follows:

Stoechr & Co.	14,900	Shares	
Hirsch & Arnold...	4,100	"	
(X) Various German			
stockholders	6,400	"	
			25,400 Shares
Stoechr & Sons	5,685	"	
Claimed by Prehn			
and others	1,205	"	
Various Stockholders			
in U. S. A.	3,710	"	10,660 "
Total:			36,000 Shares

(X) Including about 1000 shares of Austrian stockholders

I also enclose list of papers mailed to you under separate cover, by registered mail, SPECIAL DELIVERY.

I shall be at the New York Office all day tomorrow, Wednesday, Feb. 6th, in case you wish additional information.

With kindest regards to both Mr. Lenssen and yourself,
I am

Sincerely yours,

Hans E. Stoehr

2 Enclosures

Herbert A. Heyn Esq.,
Hotel Raleigh,
Washington, D. C.

SPECIAL DELIVERY

February 5, 1918

List of Contents of Registered Letter sent to
Herbert A. Heyn, Esq.,
Hotel Raleigh,
Washington, D. C.

1. Matter proving purchase of 1205 shares, containing 83 different sheets.
2. By-laws of the Botany Worsted Mills.
3. Certified copy of extract of minutes of meeting of the Board of Directors of the Botany Worsted Mills, held on June 18, 1917, regarding unpaid dividends to stockholders, dividends on shares purchased by Directors of Company from C. H. Wolfram, and dividends to stockholders where stock certificates are not available.
4. Certified copy of extract of minutes of meetings of the stockholders of the Botany Worsted Mills and Board of Directors of Botany Worsted Mills, relating

to declaration and authorization of dividends after Jan. 1, 1916.

5. Balance sheet of March 20, 1917, of Botany Worsted Mills.
6. Notice to stockholders of Botany Worsted Mills, dated Passaic, Jan. 29, 1918.
7. Copy of certificate of incorporation of Stoechr & Sons Inc., dated Feb. 15, 1917.
8. By-laws of Stoechr & Sons Inc. adopted at first meeting of the stockholders of Stoechr & Sons Inc., Feb. 19, 1917.

IV

Defendants' Exhibit H

STOEHR & SONS INC.
200 Fifth Avenue
New York City

Cable
Stoechrsons
New York

February 5, 1918

Herbert A. Heyn Esq.
Hotel Raleigh,
Washington, D. C.

Dear Sir:

I herewith wish to state that THE MAJORITY OF THE STOCK OF THE BOTANY WORSTED MILLS, PASSAIC, N. J., AND OF STOEHR & SONS INC., NEW YORK, IS HELD BY PARTIES WHO ARE "ALIEN ENEMIES" UNDER THE "TRADING WITH THE ENEMY ACT."

This information is given by me as Treasurer of the *Botany Worsted Mills*, and as President of *Stoechr & Sons Inc.*

Yours very truly,

Hans E. Stoechr

V

An analysis of the three sworn reports of Max W. Stoehr and the Botany report

*The Act provided (Sec. 7(a) that "any person in the United States who holds or has or shall hold or have custody or control of any property, beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of enemy, or of any person whom he may have reasonable cause to believe to be an enemy or ally of enemy * * * shall * * * within thirty days after the passage of this Act * * * report the fact to the Alien Property Custodian by written statement under oath, containing such particulars as said Custodian shall require."*

*Sec. 16 provided that "whoever shall wilfully violate any of the provisions of this Act * * * and whoever shall wilfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act shall, upon conviction, be fined not more than \$10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both."*

In connection with those provisions of the law, the sworn report made by Stoehr & Sons, Inc., dated December 6, 1917, becomes interesting. A photostatic copy of that report was offered in evidence by the plaintiff as plaintiff's exhibit 4 (pages 189-196; folios 360-364a) presumably to show the good faith, and even *eagerness*, of Max W. Stoehr to obey the law of the United States, just as his certificate of naturalization seemed to be produced in Court for the purpose of demonstrating his real *Americanization*. Let us glance at a copy of that report for the purpose of seeing the light it throws upon the acts and sworn declarations of Max W. Stoehr under the provisions of Sec. 7 (a) of the Act.

V

An analysis of the three sworn reports of Max W. Stoehr and the Botany report

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The report gives (1) the name of the corporation as Stoehr & Sons Inc.; (2) the address of its principal place of business as 200 Fifth Avenue, New York City, New York; (3) states that it is a corporation; and (4) that it was organized under the laws of New York. Under Schedule 1, referring to "Enemy or ally of enemy officers and directors on or after October 6, 1917", it gives, in the first column entitled "Name", the word "None"; and in the second column entitled "Official position", the word "None".

In Schedule 2, which related to "Enemy or ally of enemy holders of stock, shares, or *certificates of beneficial interests* on or after October 6, 1917", it gave the following:

Name of Registered Owner.	Name of Enemy or Ally of Enemy who is stockholder OR FOR WHOM STOCK IS HELD.	Residence (if unknown, last known address).	Nationality	No. of shares.	Par value of each share.	No. of Certifi- cate.	Class or kind of stock.	Amount of divi- dends unpaid.	Actual location of Certificate.
	1293								
Max W. Stoehr Trustee,	Eduard Stoehr	Leipzig Germany,	German	1875	\$100	1	common stock voting trust certifi- cate	6%	In Possession of Max W. Stoehr of Passaic, N. J.
	532								
Max W. Stoehr Trustee	Georg Stoehr	"	"	222.21	\$100	3	"	6%	"

[illegible]

Schedule 4 and its answer were as follows:

"List of all cases in which the undersigned has *reasonable cause to believe* that the stock or shares on February 3, 1917, were owned or are owned by an enemy or ally of enemy, though standing on the books in the name of another.

* * *

"The following question must also be answered by the person making this report:

"Did you on February 3, 1917, or at any time on or after October 6, 1917, hold, have, or have the custody or control of *any property, beneficial or otherwise, alone or jointly with others, of, for, or on behalf of* any person who is an enemy or ally of enemy, or whom you may have reasonable cause to believe to be an enemy or ally of enemy, and of which you have not yet made report to the Alien Property Custodian, or were you on February 3, 1917, or at any time on or after October 6, 1917, in any way indebted to any such person and have not yet made report of such debt to the Alien Property Custodian?

Answer: No. (See typewritten note attached)."

The following is the typewritten note "attached":

"Stoehr & Sons, Inc.

Note attached to list of stockholders &c. on Form 101 made to Alien Property Custodian.

This company was not in existence on February 3rd, 1917. HOWEVER IT STATES FOR THE INFORMATION OF THE ALIEN PROPERTY CUSTODIAN THAT IT WAS ORGANIZED ON FEBRUARY 19, 1917 UNDER THE LAWS OF THE STATE OF NEW YORK, TO TAKE OVER AND BECOME THE SUCCESSOR TO STOEHR & SONS, A PARTNERSHIP AT 200 FIFTH AVENUE, BOROUGH OF MANHATTAN, CITY OF NEW YORK, CONSISTING OF FOUR PARTNERS, namely, Hans E. Stoehr, New York City, Max W. Stoehr of Passaic, N. J., Eduard Stoehr and Georg Stoehr, the two latter of Leipzig, Germany. The capital

stock of the company was issued to the four partners in the same proportion as their interest in the partnership and the corporation assumed the indebtedness of the partnership."

Schedule 4 was signed in the margin, in the handwriting of Max W. Stoehr, as follows:

"Stoehr & Sons Inc.
by Max W. Stoehr,
Treas."

That report was signed as follows:

"STOEHR & SONS INC.
MAX W. STOEHR Treasurer & one
of the voting trustees."

It was sworn to by Max W. Stoehr December 6th, 1917.

Schedule 2 referred to "common stock voting trust certificate", but nowhere in that report was it stated that the voting trust *ran for five years*. Max W. Stoehr in that statement, initialed in the margin by him in his own handwriting, stated that the object of the corporation was:

"to take over and become the successor to Stoehr & Sons, a partnership at 200 Fifth Avenue, Borough of Manhattan, City of New York."

Not a word was stated there by Max W. Stoehr about *the contract of February 20, 1917*. His sworn statement was *false and misleading*. It has the appearance of frankness but it suppressed vital facts. It purported to be a report of *all the property or stock, "beneficial or otherwise * * * of * * * an enemy"* and it was not such a report. The statement that the capital stock of the company "was issued to the four partners in the same proportion as their interest in the partnership and the corporation assumed the indebtedness of the partnership", *was cunningly designed to*

deceive the Alien Property Custodian and to divert attention from the 14,900 shares contract of February 20, 1917 and the encumbering of that stock by a five-year voting trust agreement.

The Stoehrs did not want to sell, by an absolute sale, the Leipzig company's stock. A part of their scheme was to pitchfork it into a New York company and then issue stock to themselves which they would tie up under a voting trust agreement for five years, before the expiration of which the war would be over. Hence Max W. Stoehr cunningly referred to "*common stock voting trust certificates*" but did not state the period of the trust NOR WHO THE TRUSTEES WERE. The statement that it was "*organized . . . to take over and become the successor to Stoehr & Sons, a partnership*", while in part it represented the fact, essentially was false and misleading, for it *suppressed the fact that one of the chief objects, if not the great object, of the organization of the New York company was to vest in it, or attempt to vest in it, the 14,900 shares, as all the papers, all the declarations, all the acts, abundantly demonstrate.*

The Heyn letter shows that Max W. Stoehr's sworn report was false in essence.

The report by Max W. Stoehr, sworn to by him December 6, 1917, was, when all of the essential facts are considered, a misleading report and was a "*violation*" of the spirit of the law, if not its letter, and of the proclamations of the President and the requirements of the Alien Property Custodian issued in accordance therewith.

But the story of Mr. Max W. Stoehr's daring in December, 1917 did not end there.

He swore to two further reports to the Alien Property Custodian, both on December 3, 1917. One of those reports related to the voting trust certificate No. 1 standing in the name of Max W. Stoehr as trustee for Eduard Stoehr. That sworn report was defendants' exhibit Q-1 (pages 276-285; folios 490-497).

His sworn report as to the voting trust certificates standing in his name as trustee for Georg Stoehr was defendants' exhibit R-1 (pages 285-286; folio 498).

Again the undeniable *record facts* were stated accurately but real truth is suppressed. In each report there were careful "instructions" (1) to read carefully "all of this report" and "read instructions before beginning to make report," (2) definitions of the word "person" within the meaning of the act, (3) defined the "person whose property (including indebtedness owing him) must be reported," (4) defined "enemy" and "ally of enemy," (8) "who must make this report and what must be reported," etc. Under subdivision 8 the provisions of the Act were quoted requiring "any person in the United States who holds or has or shall hold or have custody or control of any property *beneficial or otherwise*, alone or jointly with others, of, for, or on behalf of an enemy or ally of enemy, or of any person *whom he may have reasonable cause to believe to be an enemy or ally of enemy* and any person in the United States who is or shall be indebted in any way to an enemy or ally of enemy, or to any person whom he may have reasonable cause to believe to be an enemy or ally of enemy, shall, * * * within thirty days after such property shall come within his custody or control, or after such debt shall become due, report the fact to the Alien Property Custodian by written statement under oath."

Max Stoehr swore in defendants' exhibit Q-1 (pages 276-285; folios 490-497) that he held voting trust certificate No. 1 for 1875 shares of the New York company as trustee for Eduard Stoehr.

He swore in defendants' exhibit R-1 (pages 285-286; folio 498) that he held voting trust certificate No. 3 for 222.21 shares of the New York company for Georg Stoehr.

In each sworn statement he gave the name of the New York company, the residence of the enemy, and stated that the certificate was in his name and possession as trustee but that he "had no beneficial interest in the same," gave the par value of the shares, said that the stock was not in the market, that he could not give its market value but that he "estimated its value at about \$350 per share, but he nowhere stated, in either report, *that the voting trust certificates ran for a period of five years and that he and*

his brother Hans E. Stoehr and their cousin Roehlig were the voting trustees. That was the suppression of a material fact.

There was a note attached to his sworn report in each case in which again he swore that the New York company *was organized on February 19, 1917 to take over and become the successor to Stoehr & Sons, a partnership.* He gave the location of the partnership, the members of the partnership, the names and residences of the partners, stated that the "capital stock of the company was issued to the four partners in the same proportion as their interest in the partnership" and then made a reference to "the indebtedness of the partnership to Eduard Stoehr, Georg Stoehr and *Stoehr & Company, a corporation of Leipzig, Germany,* which (as reported by Stoehr & Sons, Inc. in separate report to the Alien Property Custodian) became the indebtedness of said Stoehr & Sons, Inc., the New York corporation, *all indebtedness of the partnership having been assumed by said last named corporation.* All the directors and officers of the said New York corporation are residents of the United States."

Although the report *went into minute details on non-essential points,* it again suppressed the fact that the voting trust agreement ran for five years. It did not give the names of the voting trustees AND NO ALLUSION WHATEVER WAS MADE IN EITHER REPORT TO THE CONTRACT FOR THE 14,900 SHARES WITH THE LEIPZIG COMPANY. The evident intent of the report and of the typewritten statements embodied in it, initialed in the margin in the handwriting of Max W. Stoehr, was to convey the impression to the government officials that the *only transaction* that had taken place on the incorporation of the New York company was the turning of a partnership into a corporation. The apparently frank admission of the fact that the stock in the New York corporation was issued to alien enemies Eduard Stoehr and Georg Stoehr in the amounts named was *for the purpose of misleading* the Alien Property Custodian into a seizure of those trust certificates as alien owned, and was designed to have him overlook the continued own-

ership in the 14,900 shares and *to lead the government officers away* from the consideration of the facts that would have led to the discovery of *all* the facts regarding the contract of February 20, 1917.

Plaintiff's Exhibit 4 (pages 189-196; folios 361-364a) stated that Max W. Stoehr was trustee of the voting trust certificates of Eduard and Georg Stoehr, but it made no reference to the contract.

The case *against* Mr. Max W. Stoehr on those sworn reports comes down to this: If the *property* in the 14,900 shares passed to the New York company, then there was a *large debt* due to the Leipzig company which was not reported by him and which fact was suppressed by him.

If the property in the 14,900 shares did not pass to the Leipzig company under the contract, then there was a glaring suppression of a most material and vital fact by him, and that is the ownership of and continued interest in the 14,900 shares by the Leipzig company.

The relevance of several facts that were proved in the case *now* becomes apparent.

(1) Why Hans E. Stoehr, and *not* Max W. Stoehr, went forward to explain things, through Heyn and Lensen, to the Alien Property Custodian.

(2) Hans E. Stoehr's *anxiety* while Heyn was in Washington about what the Alien Property Custodian would do, as shown by his two letters of February 5, 1918.

(3) Hans E. Stoehr's formal "approval" of the Heyn & Covington confession of February 9, 1918; and the careful way in which, under the guidance of the cunning Heyn, *Max W. Stoehr was kept out of all those transactions.*

In February, 1918 Max W. Stoehr was "having almost *daily* conferences with" Heyn (testimony, page 114; folio 221) and Heyn was reporting to Max W. Stoehr respecting his conferences in Washington with the Alien Property Custodian or persons in his office (testimony, page 114; folio 221). Max W. Stoehr then knew that the Alien Property Custodian was investigating this question and that Heyn as counsel for these two concerns went to Wash-

ington as a representative of those concerns, to explain how matters stood (page 112; folio 216). Max W. Stoehr testified that Heyn "made a report * * *. He went down for that reason to explain those reports to the Alien Property Custodian" (testimony, page 112; folio 216).

The conclusion is inevitable that they *all* realized that Max W. Stoehr, in swearing to the reports of December 3, 1917, defendants' exhibits Q-1 (pages 276-285; folios 490-497) and R-I (pages 285-286; folio 498), and swearing to the report of December 6, 1917, plaintiff's exhibit 4 (pages 189-196; folios 361-364a), had put himself in peril of the law, and hence we have the reason for the apparent anxiety of Heyn to "explain everything," and the actual anxiety of Hans E. Stoehr when Heyn was in Washington, and the "very satisfactory" telephone communication from Heyn to Hans E. Stoehr from Washington.

Max W. Stoehr's testimony was mendacious. An analysis of his two sworn statements of December 3, 1917 and of the one of December 6, 1917, in the light of *all* the facts, demonstrates that his testimony on the trial was quite in keeping with those misleading statements. His testimony was like his sworn reports—accurate and plausible upon non-essential points, *misleading and wholly lacking in veracity upon vital points.*

The Heyn letter was not a truthful letter. Its explanations about "stock control" did not tell *all* the facts. Heyn concocted the fake contract and the "rubber-stamp transfers," but his explanation was not even a rubber-stamp explanation. It was a cunning, crafty, apparently frank but essentially false, explanation of the real motive for the whole transaction, and if Heyn's letter had been put in the form of an affidavit it might have come under the criminal provisions of *The Trading with the Enemy Act* against false and misleading reports.

The attempts of counsel for the appellant to explain the Heyn letters were grotesquely at variance with the facts. They deliberately distort the plain meaning of Heyn's statements, for there in black and white, and in the two letters of Hans E. Stoehr to Heyn, the truth was

revealed beyond the powers of the sophistical reasoning of counsel for the appellant to obscure or distort.

Neither of the Stoehrs nor Heyn was the dupe of any blind belief in forms. Heyn was no slave to a legal theory, nor were the two Stoehrs with whom he was scheming. They did not *really think* that, if enough motions were made and resolutions passed and enough rubber stamps prepared and rubber-stamp entries made, the substance could be disregarded. They hoped that *all* the facts would not be discovered and they took a chance.

Nothing can excuse the attempt of Max W. Stoehr to swear through that dark scheme to cheat the law of the United States. When danger threatened him, he kept in the background and his brother Hans E. Stoehr and their counsel Heyn came forward "to explain" and in part to confess.

During the war Max W. Stoehr marked time, waiting only for a chance to try again to save an enemy alien's property by swearing to the honesty of the false and dishonest contract that he had schemed to make, and the very existence of which in his sworn report to the Alien Property Custodian he had suppressed. He has made a double attack upon the law of our country, one with his brother Hans E. Stoehr under the guidance of Heyn, and the second by his own misleading testimony and by the futile sophistries of his present counsel.

The issue of his second attempt will be the same as that of the first.

This leads to the

Botany Company's sworn report to the Alien Property Custodian

The Botany company made a sworn report to the Alien Property Custodian as required by law on December 11, 1917 (defendants' exhibit P-1; pages 274-276; folios 487-488). The report was sworn to at Passaic, New Jersey, by Thomas Prehn the president of the company.

The Botany report gave in detail the names of the alien stockholders, their residences, the number of shares owned by them and the numbers of the certificates representing the shares. In a detailed type-written memorandum, made a part of that report, signed in the name of the Botany Worsted Mills, "by Thomas Prehn, President," and identified by Mr. Prehn personally, he went into the details regarding the purchase *abroad* in 1916 by stockholders of the company of 1205 shares, which he stated were believed to have been deposited in German banks, and that the company had proof "that the shares were actually bought and paid for by said resident stockholders."

He also swore that 2900 shares stood in the name of Thomas Prehn of Passaic, New Jersey, as trustee for Georg Hirsch, of Gera, Germany, which the Botany Company had "reason to believe belong to said Georg Hirsch. (See also Schedule 4 of this report)."

He also swore that 1400 shares stood in the name of Thomas Prehn, of Passaic, New Jersey, "as trustee for Friedrich Arnold, of Greiz, Germany", and which "this Company has reason to believe belong to said Friedrich Arnold. (See also Schedule 4 of this report)".

And then he made the following sworn statement:

"14,900 shares in the name of Stoeck & Sons, Inc., a New York corporation, IN WHICH THE COMPANY HAS REASON TO BELIEVE THAT STOEHR & COMPANY, A CORPORATION OF LEIPZIG, GERMANY, HAS AN INTEREST UNDER CONTRACT. On and prior to February 3, 1917, said last mentioned corporation had an interest in said shares which then stood in the name of H. E. Stoeck, New York City, and M. W. Stoeck, Passaic, New Jersey, as trustee. The numbers of the certificates are:—51-1050, 3441-3590, 4061-5000, and 1051-1400, 2004-2017, 2041-2060, 2151-2171, 2861-2884, 2890-2898, 3161-3260, 5251-5369, 5389-5411, 5451-5750 (See also Schedule 4 of this report)".

It is significant that, although Prehn stated in the report of the Botany, sworn to December 11, 1917, that the Botany company had "reason to believe that Stoeck &

Company, a corporation of Leipzig, Germany, has an *interest under contract* in the 14,900 shares, none of the sworn reports of Max W. Stoechr to the Alien Property Custodian made at the same time, contained any reference to that contract.

Schedule 3 of the Botany report called for the details of "Enemy or Ally of Enemy Holders of Stock, Shares, or Certificates Representing Beneficial Interests on February 3, 1917". In the brackets of that schedule in the Prehn sworn statement, appeared the following: ("Same as list attached to Schedule 2 and Schedule 4").

Schedule 4 called for a "List of all cases in which the undersigned has *reasonable cause to believe* that the stock or shares on February 3, 1917, were owned or are owned by an enemy or ally of enemy, though standing on the books in the name of another". In the brackets in that schedule he gave "H. E. Stoechr, Trustee" for Stoechr & Co., Leipzig, Germany, 10,000 shares, and "M. W. Stoechr, Trustee" for Stoechr & Co., Leipzig, Germany, 4900 shares.

The statements in Prehn's sworn report, Schedule 4, were accurate, for Schedule 4 called for the facts "on February 3, 1917".

If the contract of February 20, 1917 did what on its surface it purported to do, then the Leipzig company had no "interest" in the 14,900 shares under that contract, except possibly as pledgee of the certificates representing the shares. But that would not be "an interest in the shares", if the contract was what on its face it purported to be.

While it is not claimed that those declarations of Prehn, as President of the Botany company, are "binding", whatever that pet phrase of counsel for the appellant may mean, on Max W. Stoechr, the report of Prehn throws a clear light upon (a) the sworn statements of Max W. Stoechr, (b) the subsequent anxiety, in the latter part of January and the early days in February, 1918, of his brother, Hans E. Stoechr, and (c) upon the partly-true admissions of Heyn and the panic-stricken letters of Hans E. Stoechr to Heyn when the Alien Property Custodian was making his investigation.

VI

Decisions and authorities establishing the principle that where the parties intended their acts and declarations to be shams, Courts will give such acts and declarations no legal effect

This principle is referred to in the beginning of the discussion of the law in Point I of our brief but for convenience of reference a few of the authorities are given below.

It is always competent to show, as stated in *Wigmore on Evidence*, Volume IV, Section 2406 (a) that:

"In all such cases, therefore, the conduct is legally ineffective, or void. In the traditional phraseology of the parol evidence rule, then, it may always be shown that the transaction was *understood by the parties not to have legal effect*.

"Ordinarily the bearing of this principle is plain enough on the circumstances. It has been judicially applied to household services rendered by a member of the family, and to a writing representing merely a family understanding. It is of course also applicable to the signature of an attesting witness. When the document is to serve the purpose of a mere *sham*, this principle in strictness exonerates the makers * * *. In all these cases a common understanding for all parties is here assumed to exist."

In *Elliott on Contracts*, Section 1641, the principles are stated as follows:

"There are many instances in which the purpose or object that the parties had in view becomes important, and may be shown without in any way contradicting or varying the terms of the written instrument. In such cases, it is clear that the parol evidence rule has no application to such evidence. There are also cases, especially in

equity, in which the true nature, purpose, or object of the transaction may be shown by parol even though it may apparently contradict the writing as to the consideration, object or purpose thereof as indicated therein. Thus, as elsewhere more fully shown parol evidence is admitted to show that a deed absolute on its face, was intended as a mortgage. So, parol evidence is admissible to show that the purpose of a written assignment of an instrument, although absolute in terms, was for collateral security, or that it might be collected, and, in some instances, the same rule applies to endorsements of promissory notes. It has also been held that parol evidence is admissible to prove that an endorsement by the payee was made at the request of the plaintiff to show that the note had been paid. Parol evidence has likewise been held admissible to show that a certificate of shares issued by the corporation to a third person at the request of a stockholder in place of those which he had held and which were surrendered and cancelled was intended as security for a loan. So, where a note has been delivered conditionally, or the like, and the obligation performed or discharged, this may be shown as between the parties."

One of the cases cited by the author of the foregoing is *Storey vs. Storey*, 214 Fed. Rep., 973 (Circuit Court of Appeals, 7th circuit, 1914). In that case an action was brought on a promissory note signed by the defendant. The defendant pleaded that he was a son of the plaintiff, and that he had entered into an agreement that his father should make to him as requested, gifts of money, as advancements in anticipation of his share of his father's estate, and that upon receiving the advancements he should give into the possession of his father papers in the form of promissory notes for the special and sole purpose of evidencing the amount of the advancements, and that his father should receive and hold and use the papers only as such evidence; that from time to time sums of money were given by his father and accepted by him as advancements and not otherwise; and that he gave, and his father received, the manual possession of the papers, sued on as

promissory notes, for the purpose of evidencing the amount of said advancements, and not otherwise.

Plaintiff's demurrer to the answer was sustained in the court below, and judgment was rendered for the plaintiff. The judgment was rendered upon the admitted facts by invoking the rule that parol evidence was not admissible in an action at law to contradict the terms of promissory notes as written contracts of debt.

On appeal that was held to be error, the Circuit Court of Appeals saying, at page 974:

"As the parol evidence rule is indisputable, the error was in the application. And probably nowhere is the basis of the error more clearly and simply stated than in *Pym vs. Campbell*, 6 El. & Bl., 370:

'The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, *but evidence to show that there is not an agreement at all is admissible.*'

"Delivery is an act. Whether the act has been accomplished cannot be told by reading the paper. Therefore, when a declaration on a written contract is met by a plea of no contract, the application of the rule against varying the terms of a written contract by parol to the inquiry whether there is a contract, is a plain begging of the question, is a *tour de force* assumption of the very issue to be solved.

"Delivery is a composite act. There must be both a manual transfer, actual or constructive, and an operation of minds intending to enter into the contract.

"In the ages-old strife for predominance between objective or external and subjective or internal measurements of conduct, evolution has been away from symbolism toward the inner truth. And in the law of commercial paper, between the original parties, the *animus contrahendi* has become the predominant element. This is shown by a provision of the Uniform Negotiable Instruments Act, which has been adopted in nearly all of the States."

In *Fleming vs Morrison*, 187 Mass., 120 (1904), there was an appeal from a decree admitting a will to probate. The probate court found that the testator was of sound mind, that no undue influence had been exercised, and that the will was executed properly. The case was reported for the consideration of the whole Court upon a report containing findings of fact. Among the findings were findings that the testator called upon one Goodridge and requested him to draw up a will leaving all his property to a woman. Goodridge thereupon drew up the will, the testator signed it and Goodridge attested it as a subscribing witness. Before the testator and Goodridge parted, the testator told Goodridge that this "was a fake will made for a purpose." The Court further found that the testator meant by that declaration that he did not intend to complete the instrument by having it attested and subscribed by at least two other witnesses, and the purpose referred to by him was to induce the legatee to allow him, the testator, to have improper relations with her. Afterwards the testator determined to complete the execution of the will, and for this purpose he produced the instrument before two other attesting witnesses, told them that it was his will, that the signature was his signature, and asked them to attest and subscribe it as witnesses. Goodridge and the other two witnesses were all competent witnesses.

Under the law of Massachusetts at that time three witnesses were necessary to a will. The signature of the testator could be acknowledged before each witness separately.

It was held that probate should be denied on the ground that there was no *animus testandi* when the testator acknowledged before Goodridge and Goodridge signed as an attesting witness.

The Court at page 122 said:

"All the rulings asked for at the hearing have been waived, and the only contention now insisted upon by the contestants is that on the finding made at the hearing the proponent of the will has failed to prove the necessary

animus testandi. We are of opinion that this contention must prevail.

"The finding that before Butterfield and Goodridge 'parted' Butterfield told Goodridge that the instrument which had been signed by Butterfield as and for his last will and testament and declared by him to be such in the presence of Goodridge, and attested and subscribed by Goodridge as a witness, 'was a fake will, made for a purpose', is fatal to the proponent's case. This must be taken to mean that *what had been done was a sham*. This is not cured by the further finding that what Butterfield meant by this was 'that he did not intend to complete the instrument by having it attested and subscribed by at least two other witnesses, and that the purpose referred to by him was to induce said Fleming to allow him, said Butterfield, to sleep with her.'

"This is not a finding that Butterfield intended to sign the instrument before Goodridge as and for his last will and testament, leaving the further execution to depend on future events. Much less is it a finding that Butterfield changed his mind after he had signed and had had Goodridge attest and subscribe the instrument. *The whole finding taken together amounts to a finding that Butterfield had not intended the transaction which had just taken place to be in fact what it imported to be*, that is to say, a finding that when Butterfield signed the instrument and asked Goodridge to attest and subscribe it as his will, he did not in fact then intend it to be his last will and testament but intended to have Mary Fleming think that he had made a will in her favor to induce her to let him sleep with her.

"We are of opinion that it is competent to contradict by parol the solemn statements contained in an instrument that it is a will, that it has been signed as such by the person named as the testator and attested and subscribed by persons signing as witnesses."

VII

Certain hypothetical considerations as to a conceivable intent of the Leipzig company in regard to the contract, if the Leipzig company had known of its existence

The vital question was what was the *intent* of the parties at the time of the contract; whether the parties *intended* to do what by the terms of the contract they purported to do; whether they *in fact intended* to make a contract at all.

This may be determined by considering the *intent* of the Leipzig company, taking into account not only the terms of the contract but all the facts and conditions that existed *at the time of its execution*. It abundantly appears that the officers of the Leipzig company *did not know of* the contract and of course *could have had no real intent with regard to it*. Assuming, however, without conceding, that (a) the contract was made *with* authority, which was *not* the fact; (b) that the legal title and the beneficial ownership in the shares passed from the Leipzig company to the New York company, which was *not* the fact; (c) that even on the face of the contract the ownership in the stock passed, which was *not* the fact; and (d) that the contract did *not* become void and abrogated and dissolved on April 6, 1917, when the United States declared that it was at war with Germany, although it did become void and was dissolved on that day—assuming that the officers of the Leipzig company *knew* of the contract *at the time it was signed*, the hypothetical *intent* of the Leipzig company (for it had no actual intent) can best be ascertained by stating the alternatives that were open to the Leipzig company upon the facts at that time.

There were three conceivable alternatives.

(1) The Leipzig company could have sold the 14,900 shares *for cash* and could have received the proceeds of the sale. Communication *by wireless* from this country

to Germany continued uninterruptedly during the months of January, February and March, 1917, and up to April 6, 1917, the date of the declaration of war. Transfers of *money from the United States to Germany* were freely made during that period. If there had been an honest, *bona fide*, intention on the part of the Leipzig company, to sell the beneficial ownership in its shares, a sale for cash could easily have been arranged. The certificates properly endorsed and assigned by the Leipzig company could have been sent to a bank in a neutral contiguous country and that delivery could have been notified by wireless to the American purchaser and the certificates could be delivered by that bank to the American purchaser *at once*, and the stock could have at once been transferred, upon the receipt of a wireless notification from the Leipzig director of the assignment and delivery of the certificates, into the names of the American purchasers or their nominees in this country. The Leipzig company, by obtaining the cash, would have saved the proceeds of the stock from confiscation by the United States in the event of war. We have demonstrated the entire feasibility of making such a sale for cash. The Leipzig company in February, 1917, was not in a position to make *the best bargain possible*. It would perhaps have had to sell the 14,900 shares for cash at *some sacrifice*. But the only thing, as will be shown, for which the Leipzig company would have been willing to *sacrifice its shares was cash*, which could have been then transmitted to it and which would not have been subject to confiscation later on.

The Leipzig company did not intend to sell for many conceivable, though in this case *theoretical*, considerations:

(a) In February 1917 *practically all Germans in Germany were clamoring for unrestricted sub-marine warfare and were sure that Germany would win the war in three months by starving England by unrestricted sub-marine warfare*. The confidence in unrestricted submarine warfare to bring the war to an end in *three months* was *very general* in Germany. Hence the Leipzig company,

theoretically, would feel that (1) even if the United States came into the war there would be no sale by the United States, that the war would be over before the property could be seized and sold, and (2) that Germany as a victor in the war would dictate the terms of peace and the stock would be returned.

(b) The Leipzig company would, *theoretically*, not merely have an abiding belief in a German victory, and hence that there would be no seizure and no sale of German stock, but it would hope that the real facts of the contract would not be discovered, and that the apparent ownership in the New York company would deceive the United States officials.

(c) The Leipzig company would feel that, even if the real facts were discovered, the law *to be passed* by the United States regarding alien-owned property would provide *only for custody* of the property and management of the property during the war, and not for its sale, and hence it would be returned after peace, being carefully managed and safeguarded and augmented in the meantime.

(d) The Leipzig company, *also theoretically*, would feel secure because the certificates for the 14,900 shares *were in Leipzig in its possession*. It must at that time have felt fairly secure from a seizure of its stock in the ensuing war. The ability of the United States government to seize stock in a domestic corporation, the certificates representing the shares in which were in the hands of alien enemies, could not *then* have been realized in Leipzig, and, *again theoretically*, the Leipzig company would not have guessed so very wrongly in making that assumption, as the *present Trading with the Enemy Act*, as first enacted, did in fact provide for the transfer of shares to, or into the name of, the Alien Property Custodian, upon his demand, when "*accompanied by the presentation of the certificates which represent such shares or beneficial interests*" (sec. 12).

(e) Besides a large cash sum *then* received by the Leipzig company *in Germany* would doubtless have subjected it to very heavy war taxes or war levies, whereas *no sale* then saved it from such taxes and also saved the asset.

It required the amendment to the Act of November 4, 1918, to establish the right of the Alien Property Custodian to obtain the issuance to him of shares of stock, the former certificates for which were in enemy countries.

The Leipzig company would have taken risk in deciding, *again theoretically*, not to sell for cash.

But there would have been *no risk in a real cash sale*. But a *real sale* is just what the Leipzig company did *not then want*. There could have been no sale of the real ownership without a resultant (a) cash payment, or (b) a debt. A sale for cash, however, is what the Leipzig company did not want. A credit resulting from a sale could easily be seized. In failing to sell its stock for cash, it, *again theoretically*, showed its intention *not* to make a *bona fide* sale of its stock *for credit*.

(2) The second theoretical alternative was to sell the 14,900 shares to an American citizen or an American corporation on credit, as the contract purported to do. But, if the contract were what it purported to be, it could and would result in *no advantage* to the Leipzig company, but on the other hand would have resulted in a distinct detriment. The only object in making any contract, except for a *cash sale*, was to preserve the asset of the Leipzig company, but *credit due from* an American citizen or an American corporation *to* the Leipzig company was an asset in far greater peril in the event of war than *stock in an American corporation*. A *debt due from* an American *to* a German corporation could be easily seized by the United States, and the possibility of such seizure was, on February 20, 1917, fully understood. Such seizure was well known in the law of *all* countries, and the right to make such seizure had been fully exercised by *all the then* belligerent powers. With regard to stock in an American corporation, the situation was different.

The Leipzig company, as explained, must have felt fairly secure from the seizure of its stock because it had in its possession the certificates. *Theoretically* it must have argued that, so long as it held the certificates rep-

representing the shares, they could not be seized and sold in this country.

If it be suggested that it would be to its advantage to give a long credit, and extend the time of default, and at the conclusion of the war on the default of the New York company regain the shares, or that on the conclusion of peace it could disaffirm the contract and regain the shares, the answers *are conclusive*, namely: (a) that the Alien Property Custodian succeeded under the Act as originally passed, to *all the rights* of the Leipzig company, that (b) he could treat the contract as a sham, as no contract, and as voided and abrogated by war and so seize the shares, or (c) he could *disaffirm* the contract *on behalf of* the Leipzig company and regain the shares; or (d) recognizing the contract, he could put the New York company in default and thus regain and sell the shares. Either course would have resulted in a loss of the asset to the Leipzig company. The only result, so far as the United States was concerned, would be that the five-year voting trust of the New York company would place a cloud upon the title to the shares and that to sell a majority of the Botany stock he would have to sell the voting trust certificates held for the two aliens, that such a sale would carry with it *all the other assets* of the New York company, and would restrict the number of bids and would bring a smaller price than a sale of the Botany shares direct.

But that diminished sale price could be of *no conceivable benefit* to the Leipzig company, for that would merely diminish the amount of the funds in the hands of the Treasurer of the United States.

The five-year voting trust of the New York company's stock would make a sale difficult. Such a sale would involve either (a) the sale of the two alien owned voting-trust certificates, carrying with it the majority ownership of the stock of the New York company, and indirectly a majority of the Botany stock, which would be a cloud on the title, would make a sale difficult, and would naturally diminish the sale price, or else (b) it would result in a law suit to vacate and annul the voting trust and remove

the voting trustees. But in either event there would be no gain to the Leipzig company.

A third alternative is presented by the fact that the Alien Property Custodian could sell (a) the rights of the Leipzig Company to disaffirm the contract; (b) *his* rights as the successor of the Leipzig company *under* the contract; (c) his rights under his seizure of the shares, and (d) his undisputed title to the voting trust certificates held by the two alien enemies. But again such a sale would be the sale of a complicated asset, would discourage purchasers who might feel that they were buying into a law suit, would be the sale of assets under a cloud, and would obviously bring a greatly diminished sale price, which would diminish the funds in the hands of the Treasurer of the United States, *but would in no sense benefit the Leipzig company.*

If we are to go into *theoretical* considerations of what *might have been* in the minds of the Leipzig company, had it *known* of the contract, considerations such as the foregoing must be conceded in the minds of the Leipzig company at the time of the making of the contract.

To say then that the Leipzig company would have been willing to transfer its asset from *stock in an American corporation*, the certificates for which it *then* held, to a *credit* or debt due *from* an American corporation is to say that the Leipzig company intended to do something which must at that time have appeared to greatly imperil its asset. It would be giving up its stock and would receive in return only a *credit* which was more easily confiscable than the stock itself. It is not a sufficient answer to say that, as above pointed out, the Leipzig company was not in a position to make a *good bargain*. By exchanging its stock for credit, it would make *no real bargain at all*. If the consideration had been *cash*, the argument that it was not in a position to make a good bargain would have some point, because then the Leipzig company would at least get *something*. By exchanging its stock for a *credit*, it would get *nothing*.

The Leipzig company was not in the position of one who was compelled to take any port in a storm. But the

contract, by giving the Leipzig company a mere credit for its stock, did not even provide a port in a storm. It saved the Leipzig company nothing at all!

(3) The third theoretical decision by the Leipzig company is one which was actually made here, without of course its knowledge or consent. That was, under the guise of a contract of sale, to attempt to cover up the real ownership which all the time remained in the Leipzig company. All of the evidence points to the fact that that was the alternative which would have been adopted by the Leipzig company. It is borne out by the Heyn & Covington letter of February 9, 1918. In that letter Heyn & Covington stated that the contract was made "because the voting right on stock of alien enemies or in which alien enemies had the beneficial interest (as was the case with said 14,900 shares) was doubtful under the decisions of the courts, and if deprived of the voting right, the control of Botany might be lost".

The Leipzig company, being in possession of the certificates for the 14,900 shares, probably felt secure from seizure. It no doubt would have reasoned that since the certificates were in its possession, they could not be seized in the event of war, and after the war was over its right as a stockholder would be restored. In the meanwhile however the voting right might be lost.

The figures given in the Heyn & Covington letter show in what manner the voting control would be lost to the Stoechr interests. That letter gives the number of shares in which alien enemies had a beneficial interest at that time (including the 14,900 shares), as

	24,395
The shares belonging to Stoechr & Sons, Inc., were	5,685
Other stockholders in the United States owned	5,929
Total stock of Botany	36,000

It will be seen at a glance that eliminating the alien enemy owned shares—the 24,395—the American shareholders, other than Stoechr & Sons, Inc. could outvote Stoechr & Sons, Inc. by 235 shares.

By putting the record ownership of the 14,900 shares in Stoeck & Sons, Inc., "the voting control" of Botany would be preserved to the Leipzig interests, and Heyn, when cornered, said that this was all that was intended to be accomplished by the contract, for, as above shown, a sale for credit would not have been of any benefit to the Leipzig company, and had there been a genuine intention to sell the beneficial interest that sale would have been for cash, and such a sale was not made.

Heyn and the two Stoecks must have hoped that the subterfuge would not be discovered, and that the voting control of the Botany would be held by the voting trustees of Stoeck & Sons, Inc., the beneficial ownership of the 14,900 shares all the time being in the Leipzig company. But even if the subterfuge should be discovered, they must have expected that any confiscation act the United States would pass would be *similar to some past war acts*, and would provide merely for the custody of seized property *in specie* and would not provide for a sale of such property. So that Heyn and the two Stoecks must have expected that, even if that subterfuge were discovered, the worst that could happen would be that the United States government would seize the stock and retain it *safely in custody* until the end of the war.

It is no answer to this to say that the debt of the New York company for the stock was distributed over a period of five years, the first payment to be made on February 20, 1918. War was then imminent, and there was no presumption that the war would be over prior to the first payment. Besides, a government at war can seize debts both due and to become due to alien enemies, and can seize obligations of any kind and nature due to alien enemies.

The two Stoecks and Heyn probably counted upon the United States law *being the same as past laws* and providing for only custody and not for confiscation.

They did not want to sell, but to give a deceptive ownership to the New York company, and, if caught in the act, to explain that only the control during the war was intended.

Heyn knew that he was engaged in a desperate game. Hence he got Hans E. Stoeckl's written "approval".

The contract was cunningly and craftily intended to trick and deceive the government officers, and if and when caught, they were to be ready with the explanation that only "stock control" was intended.

If the contract was intended to provide *only* for "stock control", then it was a lie. If the contract intended to provide for more than "stock control", then *the Heyn and Stoeckl letters were lies. Lies cannot always be logical and not always consistent.*

They may theoretically have reasoned, and but for the amendment of November 4, 1918, they would have on one point reasoned correctly that (a) a debt should be created, (b) that its payment should be apportioned and postponed, (c) that though there was a debt and the Alien Property Custodian might succeed to it, he could do nothing for fourteen months, that (d) the war might be over before the expiration of the fourteen months and (e) that the law would not compel a sale. If that was the way the Stoeckl and Heyn reasoned in February 1917, they reasoned wrongly, for they overlooked the fact that the resultant debt could be seized and collected, and the voting trust certificates could be seized and sold, only that either or both such seizures would produce a less sale price, which could be of no benefit to the Leipzig company.

One year later, in February 1918, when the facts were being investigated, they knew what the law was. They then knew that either way the Leipzig company would lose. So they admitted that there was no sale, and hence that there was no debt to be seized, and took their position upon the explanation as to stock control.

In short, we have a case of *hopes* in February 1917 and *fears* in February 1918.

If there was a real sale intended, there was no reason, so far as the Leipzig company's interest was concerned, why there should be a five-year voting trust. The stock of the Botany was not widely distributed. It remained in the same control after as before, and before as after. But it was to defeat the right of capture of the United States

and to save the property for the Leipzig company that the contract was made.

There was no reason for a five-year delay. There was no reason for a sale that allowed nothing for good will, a very important element of value in the asset.

If there had been an honest sale, there was no reason for a voting trust. If there was a secret intention, then there *was* a good reason for a five-year voting trust.

In fact the Alien Property Custodian did seize the rights, privileges and benefits of the Leipzig company under the contract (defendants' exhibit L-1, pages 271-272; folios 478-480). That seizure was made March 13, 1919, *after* the seizure of the 14,900 shares, and it was *expressly* stated that said demand "shall not prejudice or affect any demands, heretofore * * * made with respect to said 14,900 shares" or "any rights, privileges or benefits acquired by virtue thereof".

To conclude:

If there had been a real intention to make such a contract it would not have helped the Leipzig company or saved its asset. Its recitals were false and were intended to mislead United States government officials. Max W. Stoehr's sworn statements to the Alien Property Custodian were misleading. The Heyn and Covington letter to the Alien Property Custodian proved the falsity of the recitals in the contract. The two letters of Hans E. Stoehr to Heyn were unequivocal admissions of the facts therein stated and demonstrate that the contract was a sham from beginning to end.

VIII

The legal title to the 14,900 shares never passed from the Leipzig company to the New York company

We have shown that the Leipzig company never had any intention to make the contract or to transfer the shares. But even assuming that it did have such an intention, which is quite contrary to the fact, intention is not the whole thing. There are numberless things or transactions which may be intended but never become legally effective *because the intention is not followed by the required legal act*. A man may *intend* to make a will, but unless the legal formula is observed, unless the legal requirements are followed, his intention is nothing. A man may *intend* to execute a deed, but unless it is properly acknowledged it is worthless. The officers of a company may have the *intention* to do a legal act, but unless the by-laws are observed their words and writings amount to nothing.

The New York parties to the contract, not to speak of the Leipzig company, did not take the proper legal steps to transfer the *legal title* to the 14,900 shares of stock to the New York company.

Before considering the records on the books of the Botany with reference to the original issue and subsequent transfers of the 14,900 shares, it is necessary to consider the provisions of the by-laws (defendants' exhibit J, pages 225-228; folios 427-429).

Article XVIII of said by-laws was as follows:

"Transfer of Shares.

"Transfer of shares, so as to entitle the holder to be recognized as owner of the company, shall only be made upon the books of the company by the holder or owner in person or by power of attorney. For the convenience of the European shareholders such transfer may be accomplished in the following manner: The certificates may

be deposited, properly endorsed, with the Vice-Treasurer at Leipzig, or with any Director resident at Leipzig, who is to CERTIFY such transfer or assignment to the Treasurer at the principal office of the company and the Treasurer shall thereupon note such transfer upon the share-book of the company and ADVISE the Vice-Treasurer or such Director at Leipzig of the transfer so made. It shall be the duty of the Vice-Treasurer or such Director resident at Leipzig to retain the certificate deposited with him, until he shall be advised by the Treasurer of the completed transfer”.

The provisions of article XVIII of the by-laws did not provide for a *surrender and cancellation* of the old certificate upon any proposed transfer. The first sentence of the article provided that the transfer “shall only be made upon the books of the company by the holder or owner in person or by power of attorney”. There was no provision, almost universal in by-laws of American corporations, that transfers shall be made only upon the presentation *and surrender* and cancellation of the old certificate. Under the peculiar provisions for the convenience of the European shareholders, the certificates to be transferred were to be deposited with a vice-treasurer or a director resident at Leipzig, but such vice-treasurer or director was to retain the certificate only until he should be *advised* by the treasurer of the company of the completed transfer, as provided in said article XVIII.

The form of stock certificate employed by the company from the time of its organization to the year 1918 differed from the usual form of certificate of American corporations (plaintiff's exhibit 6, folios 372-375). All of the stock of the company was issued in five-share certificates (Zimmerman, page 132; folio 260), each certificate being in the form of plaintiff's exhibit 6. The certificates, instead of having on the back thereof one form of assignment and power of attorney, as is the usual form in the case of American corporations, had 22 blank forms of such assignment and power of attorney. Attached to the certificate, plaintiff's exhibit 6, was a sheet of coupons. The

coupons were numbered consecutively and there were two coupons for each year subsequent to the date of the issuance of the certificate. Each coupon purported to certify that the holder was entitled to receive the amount of the preliminary dividend or the final dividend, as the case may be, declared for the first half or the second half of the business year of the Botany Worsted Mills stated on the coupon (plaintiff's exhibit 6). Attached to the dividend sheet was a so-called talon. The talon purported to entitle the holder thereof to receive the second series of coupons and delivery thereof at the office of the company at Passaic, New Jersey, or by surrender to the Allgemeine Deutsche Credit Anstalt in Leipzig (plaintiff's exhibit 6).

The form of stock record kept by the Botany also differed from the ordinary form used in American corporations. The record of stocks kept by the company consisted of a large book containing a whole page for each five share certificate outstanding (Zimmerman, pages 132-133; folios 260-261; defendants' exhibit N, page 231; folio 435). Each page of the book contained at the top the name of the person to whom the corresponding five-share certificate had been originally issued, together with the certificate number and share number. On the same page there were a number of blank forms under the general heading of "Transfers". Each of said blank forms was printed as follows:

"Transferred to
by deposit of certificate with.....
Passaic, N. J.,190....
.....Treas."

(defendants' exhibit N).

Under the by-laws and using the above described form of stock certificate and stock record, the practice of the company with reference to transfer (1) in cases where the certificates were in the United States, and (2) in cases where the certificates were in Germany, was as follows:

1. Where the certificates were in the United States the customary and unvarying practice of the company

was that the certificate representing shares proposed to be transferred *had to be presented to the Treasurer with proper endorsement thereon*. The certificate was then stamped "Transfer registered on the books of the company dated.....", and redelivered to the person requesting the transfer. This was the uniform practice of the company. No new certificates were made out (Zimmerman, page 135; folio 264). The by-laws did not provide for the surrender and cancellation of the old certificate. The form of stock certificate in use at that time contemplated a number of assignments on the back thereof. The certificate, after being presented and stamped as above set forth, was returned to the holder.

2. In the case where the certificates were not in this country but were in Germany and a transfer was to be made for European shareholders, the procedure was different. The by-laws provided in such a case that the certificates were to be *deposited, properly endorsed*, with the vice-treasurer at Leipzig or with a *director resident in Leipzig*, who was to *certify* such transfer or assignment to the treasurer *at the principal office of the company, and the treasurer should "thereupon note such transfer upon the share-book of the company and advise the vice-treasurer or such director at Leipzig of the transfer so made."* In the case of such a deposit, the vice-treasurer or director resident at Leipzig sent to the Botany company a certificate that a designated certificate or certificates had been deposited with him, properly endorsed to a person named "with the request to cause the same to be transferred upon the books of the company to the above named endorsee" (Zimmerman, page 132; folio 260; defendants' exhibit M, pages 230-231; folio 434).

After the treasurer of the Botany received such advice (defendants' exhibit M) from the vice-treasurer or director at Leipzig, the transfer was entered on the record of stock (defendants' exhibit N). When the treasurer of the company at Passaic received the certificate from the vice-treasurer or director resident at Leipzig, he was to "note such transfer upon the share book of the company",

and was then required to "*advise* the vice treasurer or such director resident at Leipzig of the transfer so made". It was the duty of the vice treasurer or such director resident at Leipzig "to retain the certificate deposited with him until he shall be *advised* by the treasurer of the completed transfer" (bylaws, article XVIII; defendants' exhibit J, pages 225-228; folios 427-429).

There was nothing in the by-laws requiring that the "certificate" from the director in Leipzig or the "advice" from the treasurer in Passaic SHOULD BE IN WRITING.

No transfers were made on the books of the Botany in the absence of either a notification from Leipzig or the production of the stock certificate, bearing the proper endorsement, at the Passaic office (Zimmerman, page 133; folio 261).

We come now to the facts with respect to the attempted transfer of the 14,900 shares.

The notation of transfer upon the 2980 pages of the book of stock records of the Botany Company representing the 14,900 shares was as follows:

"Transferred to (printed) Stoehr & Sons, Inc.,
New York (rubber stamp) *by deposit of certificate*
with (printed) *Georg Stoehr Director* (rubber
stamp) *Passaic, N. J.* (printed) *February 20, 1917*
(rubber stamp).

Hans E. Stoehr (rubber stamp)
Treas." (Printed)

(testimony of Zimmerman, pages 136-137; folio 266).

On February 20, 1917, there was not even an attempt to comply with the provisions of the by-laws. The Botany company did not have in its records any certificate purporting to be *from* Leipzig, and there was *no evidence* in the Botany company at the time this transfer was made that there was *any deposit* of the certificates *with* Georg Stoehr, director in Leipzig. Again, Zimmerman testified that he made the notation to Stoehr & Sons, Inc., *at the direction of Hans E. Stoehr* (Zimmerman page 137; folio 267).

Complainant's claim was that the New York company has title to the 14,900 shares. As above shown, he has failed to prove that it either obtained the physical certificates or a transfer of the stock represented by the certificates on the books of the Botany company in accordance with its by-laws. The establishing of title to the shares in the New York company was essential to the plaintiff's case, and the failure on February 20, 1917, to make the transfer of the shares in accordance with the by-laws of the company so as to pass the legal title thereto, was and is fatal to the legal title of the New York company.

There was no attempt whatever on February 20, 1917, to comply with the Botany by-laws. Their provisions were completely and utterly disregarded. There was no attempt to amend the by-laws so as to fit the facts of this transaction. Had the certificates been in this country, they would have had to be produced and a *formal assignment* of them made by Hans E. Stoechr and Max W. Stoechr respectively, and they would have had to be duly stamped as transferred. Nothing of the sort was done. Had they been in the usual American form, they would have had to be produced, duly endorsed by the two Stoechrs as trustees, with signatures duly witnessed, with the usual power of attorney for their transfer; or separate stock powers or assignments executed by the two Stoechrs as trustees would have had to be delivered to the Botany with the certificates themselves. Nothing of that sort was done. IT WAS NOT EVEN PROVED THAT THERE WAS ANY FORMAL OR INFORMAL ASSIGNMENT OR TRANSFER OF THEIR RIGHTS AS TRUSTEES IN THE CERTIFICATES BY EITHER HANS E. STOECHR OR MAX W. STOECHR OR BOTH TO THE NEW YORK COMPANY. A MORE COMPLETE AND UTTER FAILURE OF PROOF ON THE CRUCIAL POINT RESPECTING THE PASSING OF THE TITLE AND THE EXECUTED OR EXECUTORY NATURE OF THE TRANSACTION IT WOULD BE DIFFICULT TO IMAGINE.

"The sole authority for the transfer" of the 14,900 shares from the names of Hans E. Stoechr and Max W. Stoechr, as trustees for the Leipzig corporation" was "Hans E. Stoechr's personal directions to" Zimmerman (Zimmerman, 181).

Their ponderous and bungling attempts at regularity, their disregard of the letter as well as of the spirit of the by-laws of the Botany in the attempt to transfer the legal title of the shares to the New York company, when the United States was on the brink of war, their seeming reliance upon printed words and rubber stamps and oral instructions, was not because the two Stoehrs and their counsel Heyn did not know better, but because they could do nothing else or more, except to communicate by wireless with the Leipzig company, which they could easily have done but which is precisely what they did not want to do, because had they told the truth their confession would have been on record, and had they not disclosed the secret understanding the Leipzig company would not have consented to the transaction, so they did all that they then dared to do.

IX

Digest and analysis of the testimony offered by the defendants as to wireless communication between the United States and Germany in January, February, March and up to April 6, 1917

Wireless transfers of money were made from the United States to Germany in January, February and March and up to April 6, 1917 (testimony, page 158; folios 304-305). Mr. Barrand, one of the vice-presidents of the National Bank of Commerce in New York, testified that subject to congestion (page 158; folios 304-305), wireless transfers of money were made during January, February and March, and up to April 6, 1917, the same as before (page 159; folio 307), and that the messages even increased in number toward the end of that period (page 159; folio 308). Mr. Barrand testified that the messages were subject to United States censorship and were censored by the cable authorities (page 158; folio 305). Business communications could be sent (page 158; folio 305) but after diplomatic relations had been broken off, the censorship became no more rigorous with regard to business communications than it had been before. *The testimony was uncontradicted* that there was no discrimination against messages containing German names (pages 158-159; folio 306 of Barrand's testimony and testimony of Mr. Smith, page 177; folio 335).

Mr. Barrand, who showed complete familiarity from his own personal experiences with cable communications throughout the war and down to date, and also as to mail between this country and countries of Europe, testified, respecting *wireless communications*, that

"The Sayville station continued throughout the war to send messages. I think it was taken by the Postal Cable company, which is controlled by the Commercial." As to the Tuckerton wireless station * * * "The United

States government finally took it over, and the Western Union Telegraph company continued to use it" (Barrand, page 157; folio 304).

"* * * The Commercial had the Sayville and the Western Union had the Tuckerton" (Barrand, page 157; folio 304).

Mr. Barrand also testified as follows:

"Messages by wireless to and from Germany, in the years 1915 and 1916, and to my knowledge down to April 6, 1917, were despatched over the wireless route in very large volume. * * * And some banks even transmitted and received money by cable and wireless transfers right down to the eve of the war April 6, 1917" (pages 157-158; folios 304-305).

And again:

"With respect to the wireless service, subject to the congestion of the great number of messages, there was free communication between Sayville and Tuckerton and the other side until April 6, 1917,—I do not say but what there may have been April 5th, but there was communication with Germans freely throughout March 1917, subject to the congestion. The communication was subject to the United States Government censorship; that is they could not send a wireless saying that the steamship *Mauretania* was leaving the Port of New York, for instance. Business communications could be sent, and the Government censors had to be satisfied that it related to business, and not to an act of war in preserving the United States' neutrality" (page 158; folio 305).

While Mr. Barrand's experience was chiefly confined to the Bank of Commerce and to messages relating to financial transactions, that bank "had other messages" (Barrand, page 159; folio 306), although its *wireless messages* during January and February and March related "*principally to the transmission of money*" (Barrand, page 159; folio 306).

In answer to questions by the Court, Mr. Barrand testified:

"We transmitted during the months of February and March, 1917, wireless transfers to Germany the same as we did before. There may have been a difference,—I cannot recall what the delays were during that period but as far as the censors went I found no change. I know nothing beyond the transmission of moneys and the dispatches relative to its delay, or to its receipt and so on. There may have been other messages but none that I recall" (page 159; folio 307).

On redirect examination the witness further testified:

"I was familiar with the activities of the other companies in sending and receiving messages by wireless from this country and Germany in the year 1916 and in January, February and March of 1917, by other financial institutions.

By Mr. Quinn:

Q Now, is it not a fact *that the number of messages increased* in January, February and March, if possible, over what they were before? A *They did increase*. In some of the companies, of course, they had a situation which they wanted to clear out of and consequently messages did increase" (page 159; folio 308).

The testimony of Mr. Barrand was explicit *and uncontradicted* that there was free communication by wireless and transfers of money and despatches relative to the transfer of money as above shown.

Isaac Smith, who was the superintendent of tariffs of the Postal Telegraph Company, during that period and subsequently, testified that there was no difference between financial messages and messages of other kinds. Mr. Smith had already testified that to the best of his recollection messages were received right up to the outbreak of the war, from Germany by wireless, and were sent from this country to Germany by wireless (page 176; folio 335). Then Mr. Smith testified as follows:

"We took all kinds of messages. There was no difference, as far as I know, between financial messages and messages of other kinds, so far as their being received and sent" (page 176; folio 335).

The Postal Telegraph Company, of which Mr. Smith was the superintendent of tariffs, prior to the outbreak of war with Germany, accepted messages at its offices in the United States, transferred the same to the Atlantic Communication Company at Sayville, and it then transferred the same by wireless from the station at Sayville to Nauen, Germany (testimony of Smith, page 176; folio 335).

It was stipulated that other witnesses from the Western Union Company, operating the Tuckerton wireless station, would testify to the same effect (testimony, page 177; folio 336).

Mr. Barrand is one of the vice-presidents of the National Bank of Commerce in New York, and has been connected with that bank for a period of twelve years (page 156; folio 301). He had been in the foreign department of that bank for that whole term (page 156; folio 301). It was part of his duties, as one of the managers of the foreign department, to be familiar with and to know the facilities for communicating by cables and wireless. Even if Mr. Barrand's testimony should be limited to his actual experience from his own knowledge in the National Bank of Commerce, although actually it was not, it is a fact of which the Court will no doubt take judicial notice, that what was true of one great bank in New York city at that time engaged in foreign business would be true of all, and that, even conceding that Mr. Barrand's testimony should be limited to the operations of the National Bank of Commerce, it is not conceivable that the National Bank of Commerce could send and receive wireless messages in January, February and March, 1917, and up to April 6, 1917, and that other banks engaged in foreign exchange in New York city and business men generally could not and did not send or receive such messages.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

MAX W. STOEHR, SUING IN HIS OWN BE- half as a stockholder in Stoehr & Sons, Inc., and in behalf of all others simi- larly situated, Appellant,	} No. 546.
<i>v.</i>	
JAMES N. WALLACE ET AL., APPELLEES.	

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.*

**BRIEF FOR A. MITCHELL PALMER, INDIVIDUALLY
AND AS ALIEN PROPERTY CUSTODIAN, AND FRANCIS
P. GARVAN, INDIVIDUALLY AND AS ALIEN PROPERTY
CUSTODIAN, ON APPEAL BY THE COMPLAINANT
FROM A FINAL JUDGMENT OF THE DISTRICT COURT
OF THE UNITED STATES FOR THE SOUTHERN
DISTRICT OF NEW YORK THAT THE ORIGINAL
AND SUPPLEMENTAL BILLS OF COMPLAINT HEREIN
BE DISMISSED UPON THE MERITS.**

This is a suit in equity to enjoin the sale by the Alien Property Custodian of certain shares of stock in a corporation known as the Botany Worsted Mills. The appellant is not the owner of the stock, but alleges that he is a stockholder in another corporation which he claims is the owner of the stock in

question. Relief is sought upon the ground that (1) the statutes do not authorize the custodian to seize this stock or to sell it in the manner he proposes, and (2) if the statute does authorize these things it is unconstitutional.

DECREE OF THE COURT BELOW.

The case was heard on the merits and the bill was dismissed. (Rec., p. 319.)

THE PLEADINGS.

There were an original and a supplemental bill. (Rec., pp. 1, 20.) It is not necessary now to set out the allegations of either, since every material allegation was put in issue by answers (Rec., pp. 29, 51, 73, 79, 84, and 92), and the facts upon which the case must be determined will be set out later.

When the bill was filed A. Mitchell Palmer was Alien Property Custodian. Pending the suit, he resigned and was succeeded by Francis P. Garvan, who was substituted as a defendant. (Rec., p. 28.)

STATUTES INVOLVED.

The original Trading With the Enemy Act, as approved October 6, 1917 (40 Stat., c. 106, p. 411), provides, section 2, that the word "enemy," as used in the Act, is to be deemed to mean (a) any individual, partnership, or other body of individuals of any nationality, resident within the territory of any nation with which the United States is at war, and any corporation incorporated within such territory of any nation with which the United States is at war;

(b) the government of any nation with which the United States is at war, or any political municipal subdivision thereof. That the word "person," as used in the Act, shall be deemed to mean an individual, partnership, association, or company or other unincorporated body of individuals or corporation or body politic. That the words "end of the war," as used therein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace; that the words "to trade" shall be deemed to mean (a) pay, satisfy, or give security for the payment or satisfaction of any debt or obligation; (b) draw, accept, pay, present for acceptance or payment, or endorse any negotiable instrument or chose in action; (c) enter into, carry on, complete, or perform any contract or agreement or obligation; (d) buy, sell, lease, or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property; (e) to have any form of business or commercial transactions or intercourse with.

Section 3 provides that it shall be unlawful (a) for any person in the United States, except with the license of the President, granted to such person, or to the enemy or ally of enemy, as provided in this Act, to trade, or attempt to trade, directly or indirectly, with, to, or from, or for, or an account of, or on behalf of, or for the benefit of any other person, with knowledge or reasonable cause to believe that such other person is an enemy, or ally of enemy, or is conducting or taking part in such trade, directly or indi-

rectly, for or on account of, or on behalf of, or for the benefit of an enemy, or ally of enemy; (b) for any person to send or take out of, or bring into, or attempt to send, take out, or bring into the United States any letter or other writing or tangible form of communication, except in the regular course of the mail.

By section 6 the President is authorized to appoint and prescribe the duties of an official to be known as the "Alien Property Custodian," who shall be empowered to receive all moneys and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to such custodian under the provisions of the Act; to hold, administer, and account for the same under the general directions of the President, as provided in the Act.

By section 7 it is provided that every corporation, incorporated within the United States, and every unincorporated association or company or trustee or trustees within the United States, issuing shares or certificates representing beneficial interests, shall under such rules and regulations as the President may prescribe transmit to the Alien Property Custodian a full list, duly sworn to, of every officer, director, or stockholder known to be, or whom the representative of such corporation, association, company, or trustee has reasonable cause to believe to be, an enemy or ally of an enemy resident within the territory, or a subject or citizen residing outside of the United States, of any nation with whom the United States is at war, or resident within the territory, or a subject

or citizen residing outside of the United States, of any ally of any nation with which the United States is at war, together with the amount of stock or shares owned by each such officer, director, or stockholder, or in which he has any interest. That the President may also require a similar list to be transmitted of all stock or shares owned on February 3, 1917, by any person now defined as an enemy or ally of an enemy, in which any such person has any interest; and he may also require a list to be transmitted of all cases in which such corporation, association, company, or trustee has reason to believe that the stock or shares on February 3, 1917, were owned or are owned by such enemy or ally of enemy, though standing on the books in the name of another.

It further provides that any person in the United States who holds, or has, or shall hold, or has custody or control of any property, beneficial or otherwise, alone or jointly with others, or for or on behalf of an enemy, or ally of an enemy, or of any person whom he may have reasonable cause to believe to be an enemy or ally of an enemy, and any person within the United States who is, or shall be indebted in any way to an enemy or ally of an enemy, or to any person whom he may have reasonable cause to believe to be an enemy or ally of an enemy, shall, with such exceptions, and under such rules and regulations as the President shall prescribe, report the fact to the Alien Property Custodian by written statement, under oath, containing such particulars as such custodian shall require. The President may also require similar

report of all property so held of, for, or on behalf of, and of all debts owing to any person now defined as an enemy or ally of an enemy on February 3, 1917. It is further provided that nothing in this Act shall render valid or legal, or shall be construed to recognize as valid or legal, any act or transaction constituting trading with, to, from, for, or on account of, or on behalf of, or for the benefit of an enemy, performed or engaged in since the beginning of the war and prior to the passage of this Act, and any such Act or transaction herein performed or engaged in, except as authorized hereunder, which would otherwise have been or be void, illegal or invalid at law. No conveyance, transfer, delivery, payment, or loan of money or other property in violation of section 3 hereof, made after the passage of this Act, and not under license as therein provided, shall confer or create any right or remedy in respect thereto, and no person shall by virtue of any assignment, indorsement or delivery to him of any debt, bill, note or other obligation or chose in action by, from or on behalf of, or on account of, or for the benefit of an enemy or ally of an enemy, have any right or remedy against a debtor, obligor, or other person liable to pay, fulfill or perform the same, unless such assignment, indorsement or delivery was made prior to the beginning of the war, or shall be made under license as therein provided.

It further provides that nothing in this Act contained shall prevent the carrying out, completion, or transfer of any contract, agreement, or obligation

originally made with, or entered into by, an enemy or ally of an enemy, where prior to the beginning of the war, and not in contemplation thereof, the interest of such enemy or ally of enemy devolved by assignment or otherwise upon a person not an enemy or ally of an enemy, and no enemy or ally of enemy shall be benefited by such carrying out, completion, or performance, other than by release from obligation thereunder. It is further provided by subdivision c that if the President shall so require, any money or other property owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of any enemy or ally of an enemy, not holding a license, which the President after investigation shall determine is so owing, or so belongs, or is so held, shall be conveyed, transferred, assigned, delivered, and paid over to the Alien Property Custodian. Subdivision d provides that, if not required to pay, convey, transfer, assign, or deliver under the provisions of subdivision c, any person not an enemy or ally of an enemy who owes to, or holds for, or on account of, or on behalf of, or for the benefit of an enemy or of an ally of enemy, any money or other property, to whom any obligation or form of liability to such enemy or ally of an enemy is presented for payment, may at his option, with the consent of the President, pay, convey, transfer, assign, or deliver to the Alien Property Custodian, said money or other property under such rules and regulations as the President shall prescribe. Subdivision e expressly provides that no person shall be held liable in any court for, or in

respect to, anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act; that any payment, conveyance, transfer, assignment, or delivery of money or property made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same, to the extent of the same.

Section 8-a provides that any person not an enemy or ally of an enemy, holding lawful mortgage, pledge or lien, or other right in the nature of security in property of an enemy or ally of an enemy, which by law or by the terms of the instrument creating such mortgage, pledge or lien or right, may be disposed of on notice or presentation or demand, and any person not an enemy or ally of an enemy, who is a party to any lawful contract with an enemy or ally of an enemy, the terms of which provide for a termination thereof upon notice, or for acceleration of maturity on presentation of demand, may continue to hold said property, and after default may dispose of the property in accordance with law, or may terminate or mature said contract by notice of presentation or demand, served or made on the Alien Property Custodian in accordance with the law and the terms of such instrument or contract, and under such rules and regulations as the President shall prescribe, and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally. Subdivision b provides that any

contract entered into, prior to the beginning of the war, between any citizen of the United States or any corporation organized within the United States and an enemy or ally of enemy, the terms of which provide for the delivery during or after any war in which a present enemy or ally of an enemy nation has been, or is now, engaged, or anything produced, mined or manufactured in the United States may be abrogated by such citizen or corporation by serving 30 days' notice in writing upon the Alien Property Custodian of his or its election to abrogate such contract.

Section 9 of the Act provides that any person not an enemy or ally of an enemy, claiming any interest, right or title in any money or other property which may have been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian hereunder, and held by him, or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of an enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian, and held by him or by the Treasurer of the United States, may file with the said custodian a notice of his claim, under oath, in such form, and containing such particulars as the said custodian shall require, and the President, if application is made therefor by the claimant, may, with the consent of the owner of said property and all persons claiming any right, title or interest thereunder, order the payment, conveyance, transfer, assignment or delivery to said claimant of the money

or other property so held by the Alien Property Custodian, or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled, provided that no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property.

If the President shall not so order within 60 days after the filing of such application, or if the claimant shall have filed a notice as above required and shall have made no application to the President, such claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in a District Court of the United States for the district in which such claimant resides, or if a corporation where it has its principal place of business, to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant, to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted, then the money or other property of the enemy or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the Alien Property Custodian or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the

defendant or by the Alien Property Custodian or Treasurer of the United States, on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated. Except as therein provided the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian shall not be liable to lien, attachment, garnishment, trustee process or execution, or subject to any order or decree of any court.

Section 10 provides that nothing contained in this Act shall be held to make unlawful certain Acts. But none of these exceptions apply to this case.

Section 12 provides that all moneys paid to or received by the Alien Property Custodian, pursuant to the Act, shall be deposited forthwith in the Treasury of the United States; that all other property of an enemy or ally of an enemy, conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian thereunder, shall be safely held and administered by him, except as therein after provided. The President is authorized to designate as a depositary or depositaries of property of an enemy or ally of an enemy any bank or banks, or trust company or trust companies. The Alien Property Custodian may deposit with such depositary or depositaries or with the Secretary of the Treasury any stock, bonds, notes, time drafts, time bills of exchange, or other security or property, except money, and such depositary or depositaries shall be authorized and empowered to collect any

dividends or interest or income that may become due and any maturing obligation held for the account of such custodian; that the Alien Property Custodian shall be vested with all the powers of a common law trustee, in respect of all property, other than money, which shall come into his possession in pursuance of the provisions of that Act, and, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, may manage such property and do any act or thing in respect thereto, or make any disposition thereof, or any part thereof, by sale or otherwise, and exercise any rights which may be or become appurtenant thereto or to the ownership thereof, if and when necessary to prevent waste and to protect such property, and to the end that the interest of the United States in such property and rights, or of such person as may ultimately become entitled thereto, or the proceeds thereof, may be preserved and safeguarded; that it shall be the duty of every corporation incorporated within the United States and every unincorporated association or company or trustee or trustees, within the United States, issuing shares or certificates representing beneficial interests, to transfer such shares or certificates upon its, his, or their books, into the name of the Alien Property Custodian upon demand, accompanied by the presentation of certificates which represent such shares or beneficial interest; that the Alien Property Custodian shall forthwith deposit in the Treasury of the United States, as

thereinabove provided, the proceeds of any such property or rights so sold by him; that after the end of the war any claim of any enemy or an ally of an enemy, and any money or other property received and held by the Alien Property Custodian or deposited with the United States Treasurer, shall be settled as Congress shall direct.

Section 16 provides punishment for a violation of any of the provisions of the Act.

By an Act approved March 28, 1918, c. 28 (40 Stat., 459, 460), the fourth paragraph of section 12 of the Trading With the Enemy Act was amended so as to read as follows:

The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: *Provided*, That any property sold under this Act, except when sold to the United States,

shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of the time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: *Provided further*, That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. Any person purchasing property from the alien property custodian for an undisclosed principal, or for resale to a person not a citizen of the United States, or for the benefit of a person not a citizen of the United States, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than \$10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. * * *

By an act approved November 4, 1918, c. 201 (40 Stat. 1020), subdivision *c* of section 7 of the Trading with the Enemy Act, approved October 6, 1917, was amended to read as follows:

If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trademarks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered, and disposed of as elsewhere provided in this Act. * * *

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person

or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

EXECUTIVE ORDERS.

By an Executive order by the President on the 12th of October, 1917, printed at page 286 of the record, the President vested in the Alien Property Custodian the executive administration of all the provisions of section 7-a, section 7-c, and section 7-d of the Trading With the Enemy Act, including

all power and authority to require lists and reports and to extend the time for filing same, conferred upon the President by the provisions of said section 7-a, including the power and authority conferred upon the President by the provisions of said section 7-c to require the conveyance, transfer, assignment, or delivery or payment to himself, at such time and in such manner as he shall prescribe, of any money or other property owing to or belonging to or held for, by, or on account of or on behalf of or for the benefit of any enemy or ally of enemy which, after investigation, the Alien Property Custodian shall determine to be so owing or so belonging or so held. The President further vested in the Alien Property Custodian the execution and administration of all the provisions of Section 8-a, section 8-b, and section 9 of the Trading With the Enemy Act so far as said sections relate to the powers and duties of said Alien Property Custodian. The Alien Property Custodian was further authorized to take all such measures as may be necessary and expedient and not inconsistent with law to administer the powers hereby conferred, and shall further have power and authority to make such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out the provisions of Section 7-a, section 7-c, section 7-d, and section 8-b, conferred upon the President by the provisions thereof and by the provisions of section 5-a, said rules and regulations to be duly approved by the Attorney General.

By an Executive order issued on the 5th day of February, 1918, the President amended paragraph 30 of the Executive order dated October 12, 1917, thereby providing that any person not an enemy or ally of an enemy, who owes to or holds for or on account of or on behalf of or for the benefit of an enemy or ally of an enemy not holding a license, any money or other property, or to whom any obligation or form of liability to said enemy or ally of an enemy is presented for payment, having first obtained the consent of the Alien Property Custodian, may pay, convey, transfer, assign, or deliver to or upon the order of the Alien Property Custodian such money or other property with like effect as if said payment, conveyance, transfer, assignment, or delivery was made in obedience to the requirements pursuant to the provisions of section 7, subdivision c of the Trading With the Enemy Act; and paragraph 31 was amended, whereby the President vests in the Alien Property Custodian the executive administration of all provisions of section 8-a and section 8-b of the Trading With the Enemy Act, including the power and authority conferred or imposed upon the President by the provisions of said section 8-a, and the notice therein required to be given to the President shall be given to the Alien Property Custodian. (P. 288 of the record.)

The President, on the 28th of February, 1918, issued an Executive order prescribing the rules and regulations respecting the exercise of the power and

authority and the performance of the duties of the Alien Property Custodian under the Trading With the Enemy Act and prior Executive orders, pursuant thereto. (P. 289 of the record.) In that Executive order, subdivision c, of subdivision 1, the words "right," "title," "interest," "estate," "power," and "authority" of an enemy, as used therein, shall be deemed to mean, respectively, such "right," "title," "interest," "estate," "power," and "authority" of the enemy as may actually exist, and also such as might or would exist if the existing state of war had not occurred, and shall be deemed to include, respectively, the "right," "title," "interest," "estate," "power," and "authority" at law, or in equity, or otherwise of any representative of or trustee for an enemy or other person claiming under, or in the right of, or for the benefit of the enemy.

By subdivision 2 of this Executive order (subdivision a) the Alien Property Custodian may make demand for the conveyance, transfer, assignment, delivery, and payment of any money or other property owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of an enemy, not holding a license granted by the President or in the exercise of his power and authority, which the Alien Property Custodian, after investigation, shall determine is so owing or so belongs or is so held, together with every right, title, interest, and estate of the enemy in and to such money and other property and every power and authority of the enemy thereover, including, but without limiting

the generality of the foregoing, the power and authority to affirm, ratify, approve, revoke, repudiate, or disprove, in whole or in part, and at any time or times, any power, agency, trust, or other relation at the time existing, and also any act or omission theretofore, done in the execution of or pursuant to any power, agency, trust, or other relation which the enemy could or might lawfully revoke, repudiate, disaffirm, ratify, or approve; and also including, but without limiting the generality of the foregoing, the power and authority to supervise and control the future exercise of any power, agency, trust, or other relation over such money or other property to the extent that the enemy could or might lawfully direct, supervise, and control the same.

A demand for the conveyance, transfer, assignment, delivery, and payment of money and other property, unless expressly waived or limited, shall be deemed to include every right, title, interest, and estate of the enemy in and to the money or other property demanded, as well as every power and authority of the enemy thereover.

Subdivision c of section 2 also provides when demand shall be made and notice thereof given as hereinabove provided, such demand and notice shall forthwith vest in the Alien Property Custodian such right, title, interest, and estate in and to the possession of the money or other property demanded, and such power and authority thereover as may be included within the demand, and the Alien Property Custodian may thereupon proceed to

administer such money and other property in accordance with the provisions of the Trading With the Enemy Act and with any orders, rules, or regulations heretofore, hereby, or hereafter made by the President or heretofore or hereafter made by the Alien Property Custodian.

Under clause 3 of this Executive order, subdivision d, the Alien Property Custodian may exercise any right, power, or authority of the enemy in, to, and over corporate stock, shares, or certificates representing beneficial interests owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of, an enemy, including (1) the right to receive all notices issued by the corporation which issued such stock, shares, or certificates; (2) the right to exercise all voting power appertaining to such stock, shares, or certificates; (3) the right to receive all subscriptions or dividends and other distribution and payment, whether of capital or income, declared or made on account of such stock, shares, or certificates, regardless of whether or not such stock, shares, or certificates be in the possession of the Alien Property Custodian, and regardless of whether or not such stock, shares, or certificates have been transferred to the Alien Property Custodian upon the books of the corporation, association, company, or trustee issuing the same.

That the Alien Property Custodian may demand the transfer of the corporate stock, shares, or certificates representing beneficial interests to be made upon the books of any corporation, unincorporated asso-

ciation, company, or trustee issuing the same into the name of the Alien Property Custodian.

Subdivision f (at p. 292 of the Record) provides that the Alien Property Custodian may sell and deliver any commodity or other tangible property which may be perishable or which may in the preservation thereof involve expense, and the Alien Property Custodian may sell and deliver any right, appurtenant to the ownership of the corporate stock, shares, or certificates, or beneficial interests, in cases where such rights would lapse, unless exercised within a limited time.

The Alien Property Custodian may manage, conduct, and operate any business belonging to or held for, by, or on account of, or on behalf of, or for the benefit of any enemy, in a case where the continuation of such business may seem necessary to prevent waste, or to protect such business, and in the management, operation, conduct, sale, or other disposition of such business the Alien Property Custodian may exercise every right, power, and authority of the enemy.

By further Executive order issued by the President on the 16th day of July, 1918, the Alien Property Custodian was given the power and was authorized and directed to hold, manage, administer, protect, preserve, control, and sell, or otherwise dispose of, in accordance with the rules and regulations, any and all property, other than money, which has been, or shall be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the

provisions of the Trading With the Enemy Act, as amended, and the Executive proclamations or orders issued pursuant thereto (p. 295 of the record).

By the fifth clause of that Executive order the Alien Property Custodian is given full power and discretion with respect to property to be sold, and may sell any property or property rights as an entirety in such groups or parcels, and at such time and place as he shall determine, and without reference to the previous enemy or ally of an enemy's ownership thereof.

And by subdivision 6 of that order, it is provided that—

Whereas said Trading with the Enemy Act as amended provides that "any property sold, except when sold to the United States, shall be sold only to American citizens at public sale to the highest bidder, after public advertisement of the time and place of sale, which shall be where the property or a major portion thereof is situated, unless the President, stating the reasons therefor in the public interest, shall otherwise determine."

The President then determines otherwise as follows:

(a) Shares of stock or other beneficial interest in a corporation, unincorporated association, company or trust, and claims, receivables and intangibles of all kinds may be advertised and sold wherever the Alien Property Custodian shall determine; and it shall be immaterial whether such shares of stock or other beneficial interest and such claims, receivables and intangibles be represented or evidenced

by certificates or instruments or writings of any kind, and whether the Alien Property Custodian shall or shall not have possession or control thereof in the event that the same shall be thus represented or evidenced.

And the reasons for the foregoing determinations in the public interest are specified. By subdivision 9, printed at page 300, it is provided:

The Alien Property Custodian * * * shall have power and authority to do any and all things reasonable or proper in or about or in respect of the exercise of any of the powers and authority specifically granted above; and in addition are authorized and directed hereby to manage all such property and to do any act or things in respect thereof or make any disposition thereof or any part thereof by sale or otherwise and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof, in like manner as though the Alien Property Custodian were the absolute owner thereof, subject to no limitations or restrictions other than those specifically set forth herein or in said "Trading with the Enemy Act," as amended, or any prior Executive orders issued pursuant thereto not in conflict herewith.

THE FACTS.

The number of shares of stock of the Botany Worsted Mills claimed in the bill as the property of Stoehr & Sons (Inc.) (a New York corporation) is 20,590, but the Alien Property Custodian has in fact seized and threatened to sell only 14,900 shares of

such stock. The court in its opinion recognized this limitation and the only question presented to it was as to the 14,900 shares of the Leipzig Corporation (Rec. 318), and dismissed the bill.

This brief will be confined to a discussion of the title to these 14,900 shares of the Botany Worsted Mills stock, which is all the stock of Stoehr & Sons (Inc.) that the custodian has seized or claims the right to sell. These 14,900 shares of the stock of the Botany Worsted Mills were for many years prior to February 20, 1917, the property of Kammgarnspinnerei Stoehr & Co., Aktiengesellschaft of Plagwitz, Leipzig, Germany, which will hereafter be called the Leipzig company.

The Botany Worsted Mills Corporation was organized on May 11, 1899, under the laws of New Jersey for the business of the spinning of wools, worsted and yarns, and the manufacture of dress goods and men's wear. The capital stock of this corporation was \$3,600,000, and consisted of 36,000 shares of the par value of \$100 each. Ever since its incorporation it has been, and is now, engaged in the business of manufacturing woolens and worsted cloths and yarns (Rec. 104, 105). The firm in Leipzig was founded about 1880 and the one in America about 1889. At that time there was a firm of Stoehr & Sons in Leipzig, a partnership, and there was a corporation known as the Kammgarnspinnerei Stoehr & Co., Aktiengesellschaft of Plagwitz, Leipzig. Stoehr & Sons, a copartnership, did business in America, one partner in America and one partner in Ger-

many, and the firm had assests both in Germany and America (Rec. 119). The partnership seems to have consisted of Eduard Stoehr, the father, Georg Stoehr, who lived at Leipzig, Hans E. Stoehr, who is a German citizen and lived in this country, and the plaintiff, Max W. Stoehr, who lives in this country and had become naturalized as an American citizen in 1911 (Rec. 119, 120). The Kammgarnspinnerei Stoehr & Co. was a corporation existing in Germany at Leipzig. There were five members of a body which corresponds to an executive committee on the American side. These five members were Eduard Stoehr, Hans E. Stoehr, and three other members, who lived in Germany. There were two directors of this corporation, Georg E. Stoehr and Dr. Kuntze, who lived in Germany.

The capital of this German corporation was 12,000,000 marks. The plaintiff was the owner of 600,000 marks. Eduard Stoehr was a large stockholder—larger than Hans or the plaintiff—and Georg Stoehr was also a stockholder. The stock of Stoehr & Co. is on the exchange in Leipzig and Berlin, and it is there largely traded in. There were a large number of other stockholders (Rec. 119, 120). When the Botany Worsted Mills was incorporated the stock issued was to the Stoehr family. The American copartnership of Stoehr & Sons seems to have been organized on May 1, 1913. The parties were Eduard Stoehr, of Germany; Hans E. Stoehr, of New York City; Georg Stoehr, of Leipzig, Germany; and the complainant, Max W. Stoehr, of Passaic, N. J.

These copartnership articles are printed at page 210 of the record. Eduard Stoehr, the father, and Hans E. Stoehr were to be active partners, and Georg Stoehr and the complainant, Max W. Stoehr, were to be silent or passive partners. The active partners were to have the sole charge and conduct of the business and represent the copartnership, and were to have the sole right to make and sign contracts or other papers relating to the affairs of the copartnership or to incur any liability on its behalf. The silent or passive partners could not without written consent of the active partners participate in the conduct of the business or sign or incur any liability on its behalf. The active partners were to have the right to conduct the business in such manner as they might think best, except that no transaction involving a value of more than \$25,000 could be consummated without the written consent of all the partners (Rec. 211). The capital of the copartnership was \$560,000, of which Eduard Stoehr contributed \$420,000; Hans E. Stoehr, \$80,000; and Max W. Stoehr, the complainant, \$10,000 (Rec. 212).

Prior to 1914 these 14,900 shares seem to have stood on the books of the corporation of Botany Worsted Mills in the name of this Leipzig corporation. (See Vote Annual Meeting of Stockholders from 1910 to 1914, p. 246.)

On January 15, 1915, 10,000 of the 14,900 shares were transferred to Hans E. Stoehr as trustee for the Leipzig corporation, and on February 25, 1915, 4,900 shares were transferred to Max W. Stoehr, the com-

plainant, as trustee for the Leipzig corporation. (See Rec. 106, 232.)

The European war then commenced (in August, 1914). The certificates of this stock for 14,900 shares, standing in the name of the Leipzig corporation, were in Germany and had never been sent to this country, and had not been canceled by the Botany Worsted Mills Corporation, but apparently certificates of stock had been issued to Hans E. Stoehr and Max W. Stoehr as trustees. This was the condition which existed until early in February, 1917, when diplomatic relations between the United States and the Empire of Germany were severed, and it was perfectly plain war would shortly ensue. Eduard Stoehr and Georg Stoehr, two members of this copartnership, were in Germany. Hans E. Stoehr (a German citizen, but a resident of this city) and Max W. Stoehr (an American citizen who had been naturalized) were in this country, and, so far as appears, without any communication with the German members of the firm or with the German corporation, those residents of this country started to put their affairs in order to meet the situation that then existed. The copartnership, which by its articles of copartnership could not execute any obligations imposing liability of more than \$25,000 without the consent of all the partnership, started to incorporate its copartnership business under the laws of the State of New York. A corporation was organized by Max W. Stoehr, Alfred de Liagre, and Georg G. Röblig, and that

certificate is printed at page 184 of the record. The directors for the first year were the incorporators and Hans E. Stoehr. The subscribers to the capital stock of the corporation were Max W. Stoehr, eight shares; Georg G. Röhlig, one share; and Alfred de Liagre, one share.

The first meeting of the incorporators was held on the 19th of February, 1917, and a resolution was adopted whereby the firm of Stoehr & Sons transferred to the corporation the business mentioned in their written offer, for the entire capital stock of the company, to wit, \$250,000. There was presented at that meeting an offer, signed by Stoehr & Sons, to sell the business, property, good will, firm name, and other assets of Stoehr & Sons, in consideration of \$250,000 of the common stock of the company. The offer having been accepted, Stoehr & Sons, by an instrument in writing printed at page 189 of the record, bargained, assigned, transferred, and set over to the corporation, all of the property of the copartnership for the issue of 2,500 shares of stock. This transfer was signed by Hans E. Stoehr in the name of Stoehr & Co. These 2,500 shares of stock of the New York corporation were issued to—

	Shares.
Max W. Stoehr.....	1,875
Hans E. Stoehr.....	357.14
Max W. Stoehr.....	223.21
Max W. Stoehr.....	44.65

Thereafter all of the said shares of stock of Stoehr & Sons (Inc.) were transferred to Hans E. Stoehr, Max W. Stoehr, and Georg Röhlig, as voting trus-

tees, and voting trust certificates were then issued as follows:

	Shares.
Max W. Stoehr, as trustee.....	1,875
H. E. Stoehr.....	357. 14
Max W. Stoehr, trustee.....	223. 21
Max W. Stoehr, trustee.....	44. 65

(Rec. 256.)

The corporation then being organized, it was necessary to dispose of these 14,900 shares of the Botany Worsted Mills, then in the name of Hans E. Stoehr, 10,000 shares as trustee for the Leipzig corporation, and 4,900 shares in the name of Max W. Stoehr, in trust for the Leipzig corporation, and thereupon there was executed the contract annexed to the bill, upon which this action is based. That contract is printed at page 14 of the record.

Thus the situation of the parties at the time of the transactions in question was as follows:

The Stoehr family.

The Stoehr family is composed of Eduard Stoehr, the father, and his three sons, Georg, Hans, and Max, all native Germans, originally residing at Leipzig. Eduard and Georg have continued their residence at Leipzig and are German subjects. Hans removed to the United States early in 1900 and resided here until his death in March, 1918. He was a German subject, although he had taken out his first papers toward becoming a naturalized citizen. Max removed to the United States early in 1900 and has since continuously resided in the United States. He is a naturalized citizen.

Kammgarnspinnerel Stoehr & Co., Aktiengesellschaft.

This is a German company and was founded in 1880 by Eduard Stoehr. It has since owned and operated a woolen mill at Leipzig. It had a share capital of 12,000,000 marks. Max owned 600,000 marks. Hans owned 1,000,000 or more marks. Georg owned between 1,000,000 and a half and 2,000,000 marks; Eduard owned more than any of the sons, but the amount is not definitely shown by the testimony. There were many other stockholders, and its stock is listed on the Berlin Exchange. The father has continuously held important office in the German company and exercised a large measure of control over its affairs. According to the latest information he was president of the Aufsichstrat, a position corresponding largely to that of the chairman of the board of directors of an American corporation. Georg, according to the latest information, was one of the two directors in whom the active management of the corporate affairs is lodged. Hans was, until his death, a member of the Aufsichstrat.

Botany Worsted Mills.

This is a New Jersey corporation and was formed by Eduard in 1889. It has since owned and operated, at Passaic, N. J., a wool and yarn mill—the largest and most complete plant of its kind in the United States, if not in the world. It has a capital of \$3,600,000, divided into 36,000 shares. The Stoehrs have always held important offices in this corpora-

tion and largely dominated its affairs. At the time of the execution of the sales contract, Eduard, Georg, Hans, and Max were all directors. Hans also held the office of treasurer, in which office the by-laws vested, in a very large and unusual way, the active management of the corporate affairs. Max was the secretary.

Stoehr & Sons—The partnership.

In 1913 Eduard and the three sons formed a partnership under the name of Stoehr & Sons in which Eduard owned about 75 per cent, Hans about 14 per cent, Georg about 9 per cent, and Max about 2 per cent. The partnership had assets both in Germany and in the United States and conducted an active business in both countries. Among its assets were 5,690 shares of Botany Worsted Mills stock. (The balance sheet of Stoehr & Sons (Inc.) lists 6,090 shares, but it appears that it was the record owner of only 5,690 shares and the claim to the additional 400 shares is not explained.) Certificates for only 1,290 of the 5,690 shares were in the United States, the remainder being in Germany. The partnership actively engaged in dealing in wool. It was closely affiliated with and assisted in financing the operations of Botany. It also had other investments and dealt in securities. Under the articles of partnership, Eduard and Hans were the active partners and Georg and Max the passive partners. Under the articles, however, no transaction involving more than \$25,000 could be entered into without the

consent in writing of all the partners. Max says that this and other provisions of the articles were not observed and that the business was conducted largely as a family affair. The compensation of Eduard was fixed at \$3,000 per annum and of Hans at \$5,000 per annum, and this provision, it seems, was observed.

Stoehr & Sons (Inc.).

On February 19, 1917, Max Stoehr, Georg Stoehr, Georg G. Roehlig, and Alfred de Liagre united in incorporating a New York corporation under the name of Stoehr & Sons (Inc.). Röhlig was a nephew of Eduard Stoehr and was superintendent and vice treasurer of Botany. He was a native German, but had been a resident of the United States and connected with Botany since 1899. He was a naturalized citizen. De Liagre was executive head of the New York office of Botany and of its general sales department. He was a native German, but had been a resident of the United States and connected with Botany since 1903. He, too, was a naturalized citizen, and had been for many years a close friend of the Stoehr family. The corporation began its existence with the following officers:

Hans Stoehr, president; Röhlig, vice president; Max Stoehr, secretary and treasurer; De Liagre, assistant secretary and assistant treasurer.

Hans did not participate as an incorporator, presumably because he was not an American citizen.

Röhlig and De Liagre had no real interest, and presumably acted to oblige Hans and Max.

The incorporators and Hans Stoehr composed the board of directors. At the first meeting of the board of directors, a letter purporting to be signed by Stoehr & Sons, the partnership (and actually signed by Hans Stoehr in the name of the partnership), was presented to the board, offering to sell and convey to the corporation all of the assets of the partnership, in consideration of the assumption of all of its liabilities and the issuance of all of its stock to the Stoehr family (amounting to \$250,000), and in the exact proportion to their respective interests in the partnership. This offer was at once accepted by unanimous action of the full board and a bill of sale signed in the name of the partnership by Hans Stoehr, and reciting the considerations mentioned, was delivered. There is no evidence that Eduard or Georg authorized or had any knowledge of this transaction and this transaction furnishes the only basis for the claim of the corporation to the assets of the partnership. The corporation had no other assets. Stock certificates were thereupon issued in accordance with the proposition of sale, except that the certificates going to Eduard and Georg were issued in favor of Max, with the result that Hans and Max thereby became the holders of record of the entire stock issue. Max thereupon executed a declaration of trust in favor of Eduard as to 1,875 shares and in favor of Georg as to 223 plus shares, these numbers being the numbers going to Eduard and

Georg, respectively, under the proposition of sale. On the same day, Hans and Max transferred the entire 2,500 shares to Hans, Max and Röhlig as voting trustees pursuant to the provisions of a voting trust agreement. Voting trust certificates were then issued to Hans for 357 plus shares, to Max as trustee for 1,875 shares (being Eduard's), to Max as trustee for 223 plus shares (being Georg's), and to Max individually, 44 plus shares. The voting trust was to continue for five years.

The directors of the corporation voted to Hans a salary of \$24,000 per annum, plus 6 per cent of profits in lieu of the salary of \$5,000 which he received from the partnership, and to Max a salary of \$18,000 per annum, plus 5 per cent of profits. Max received no compensation from the partnership. He testified that his brother Hans divided his \$5,000 salary with him, and that his father divided his \$2,000 salary with Georg.

History of 14,900 shares prior to the sales contract.

The 14,900 shares in question were originally issued to the German company, and were continuously held by it in its own name until 1915. Then, as before stated, 10,000 shares were transferred on the books of Botany to Hans as trustee and the remaining 4,900 shares to Max as trustee. The certificates at the time of the transfer were in Germany and have remained there. The transfer purported to be made pursuant to a special provision of the by-laws. Notwithstanding this transfer, Botany continued to credit on its

books to the German company all dividends on these shares, and actually remitted the dividends to the Germany company until the latter part of 1916, when, by reason of the World War, remittances were no longer possible. The complete beneficial ownership by the German company of these shares was fully recognized by all parties concerned. The by-laws of Botany contained the usual provision for the transfer of shares, and in the same article a special provision for the convenience of European shareholders. This special provision in effect was that certificates might be deposited with the vice treasurer or a director of Botany at Leipzig duly transferred, and that, upon receipt of advice in a prescribed form from such vice treasurer or director that the certificate had been transferred and deposited, the transfer would be noted upon the books of Botany. In this instance Georg, although then in the United States, made the usual certificate of transfer and deposit, and thereupon the transfer above mentioned to Hans and Max as trustees, respectively, was noted on the books of Botany.

SALES CONTRACT.

On February 20, 1917, being the day following the day of incorporation of Stoehr & Sons (Inc.), and the other acts above mentioned, in connection therewith and 17 days after the severance of diplomatic relations with Germany, the "Sales contract" was signed. Before stating the occasion of and circumstances surrounding and following the signing of the sales contract, we give a condensed summary of the

pertinent facts concerning the relations of the Stoechr family to the several corporations involved and to the shares in question:

(1) *Stoechr & Sons (Inc.)* was 100 per cent the property of the Stoechr family, and 85 per cent belonged to those of the house who were both subjects and residents of Germany (Eduard and Georg). It was completely dominated by Hans. Its organization and history need not be restated.

(2) *Kammgarnspinnerei Stoechr & Co. Aktiengesellschaft*.—This company was founded and all the time since has been largely controlled by Eduard Stoechr and his family. The extent of share ownership of the Stoechr family is not definitely shown by the testimony, but Max owned 600,000 marks out of a total of 12,000,000, and the others of the family each owned much larger amounts. Eduard held a position corresponding to that of chairman of an American board of directors. Georg was one of the executive managers and Hans a member of its directorate.

(3) *Botany Worsted Mills*.—Founded and from the beginning largely controlled directly and indirectly by the Stoechr family. Eduard, Georg, Hans, and Max were all directors. Hans was its treasurer and dominated its affairs. Max was its secretary. *Stoechr & Sons* (the partnership) owned and *Stoechr & Sons (Inc.)* claimed as successor of the partnership 5,690 of its shares and the German company owned 14,900 shares which stood in the names of Hans as to 10,000 and Max as to 4,900. *Botany*

also enjoyed close and active business relations with Stoehr & Sons and the German company.

The principal evidence touching the occasion of and the circumstances surrounding and following the signing of the sales contract are the minutes of Stoehr & Sons (Inc.), the testimony of Max Stoehr, the letters of Hans Stoehr to Heyn & Covington (Rec. 224-226), and the letters of Heyn & Covington to the Alien Property Custodian (pp. 218-219 of the record, approved by both Botany Worsted Mills and Stoehr & Sons (Inc.), Rec. 223). The minutes of Stoehr & Sons (Inc.) (Feb. 20, 1917, pp. 187, 188-189) show the presence of the entire board of directors, Hans presiding and Max acting as secretary. The board at this meeting and apparently by unanimous action authorized the execution of the sales contract by Stoehr & Sons (Inc.), through Röhlig as vice president and Max as secretary. It was evidently contemplated that Hans would sign for the German company, and hence the authorization of the vice president to sign the contract. The testimony of Max is that no one except Mr. Heyn and the members of the board of Stoehr & Sons (Inc.) participated in any way in the negotiations preceding or in the drafting or signing of the sales contract. Heyn was the attorney who incorporated Stoehr & Sons (Inc). He drafted the original articles of partnership of Stoehr & Sons—the partnership—and had been its regular counsel continuously since. He was also and had for some years been the regular counsel for Botany. The German

company had no legal representative and no business representative other than Hans. Max's testimony goes no further (Rec. 113).

The Heyn & Covington letter was written under the following circumstances: In December, 1917, Stoehr & Sons (Inc.) made a report to the Alien Property Custodian, pursuant to the Trading With the Enemy Act, of the beneficial ownership of Eduard and Georg Stoehr in the stock in that corporation before mentioned as going to them but standing in the name of Max. Botany had also reported to the Alien Property Custodian, pursuant to the requirements of the Trading With the Enemy Act, the ownership by sundry alien enemies other than the Stoehrs of 9,510 shares of its capital stock other than the 14,900 shares here involved, and the beneficial ownership on February 3, 1917, by the German Company of the 14,900 shares in question. The Alien Property Custodian (p. 229) wrote to Stoehr & Sons (Inc.) with special reference to those 14,900 shares and requested an explanation. Mr. Heyn and Mr. Lennsen, another attorney, were employed jointly by the board of directors of Stoehr & Sons (Inc.) and Botany to present and explain to the Alien Property Custodian the whole question of alien enemy ownership of shares in both corporations. Accordingly Messrs. Heyn and Lennsen, early in February, went to see Judge Brodhead and Mr. Duvall, representatives of the Alien Property Custodian at Washington. After conference the attorneys were requested to reduce their explanations

to writing. On February 9, 1918, the following letter was accordingly written by Heyn & Covington, with the approval of Mr. Lennsen, to the Alien Property Custodian (Rec. 218):

BOTANY WORSTED MILLS,
STOEHR & SONS (INC.).
ALIEN PROPERTY CUSTODIAN,
Division of Corporations,
Sixteenth and P Streets NW.,
Washington, D. C.
Attention of Judge J. Davis Brodhead
and Mr. Andrew B. Duvall.

GENTLEMEN: At the conclusion of our conferences last Wednesday, February 6, 1918, it was arranged that we put in written and summary form the various facts and statements made and hereby take pleasure in doing so.

As to where the control of these companies is.

As will be pointed out hereafter more in detail and as stated by us in our various conferences, considerably more than a majority control of these companies is in alien enemies under the act. The exact figures and stockholdings are stated more at length below.

Botany Worsted Mills of Passaic, N. J.

The Botany Worsted Mills was organized in 1889 under the laws of the State of New Jersey. It was founded by Mr. Eduard Stoehr, of Leipzig, Germany, who is the head of the Stoehr family. He was also the founder of

Stoehr & Co., a German corporation, which had been organized in 1880 and was engaged in Leipzig, Germany, in the manufacture of yarns and textile goods.

By-laws and certificate of incorporation.

We submit herewith a certificate of incorporation of the Botany Worsted Mills; also a copy of its by-laws which have been substantially in this form since its organization, with various amendments as to details, the last amendment having been made in 1913.

Capital stock of Botany Worsted Mills.

Present amount \$3,600,000, all common stock, consisting of 36,000 shares; par value \$100 each. There have been various increases of the original capital stock (which was \$1,100,000) since the organization in 1889, the last increase to the present amount having taken place in 1908.

Botany Worsted Mills is engaged in the manufacture of worsted woolen and other yarn and textile goods. Its plant is situated in Passaic, N. J., and the company has about 6,500 employees.

Number of directors.

The by-laws provide that the number of directors shall not be less than 7 nor more than 11 (by-laws, Art. V, par. 2). The number of directors for any year is determined by the stockholders at their annual meeting (by-laws, Art. V, par. 2). At the March, 1917, meeting they determined that there

should be 10 directors. At the present time there are eight directors, whose names, residences, positions which they now occupy in the company, and the length of time of their connection with the company are as follows:

Present board of directors (eight directors with two vacancies).

Thomas Prehn, of Passaic, N. J., president, connected with the company since 1889.

Hans E. Stoehr, of New York City, treasurer, connected with the company since 1902.

Ferdinand Kuhn, of Bernardsville, N. J., vice president, connected with the company since 1891.

George E. Roehlig, of Passaic, N. J., superintendent and vice treasurer, connected with the company since 1889.

Max W. Stoehr, of Passaic, N. J., secretary, connected with the company since 1903.

Alfred de Liagre, of New York City, executive head of New York office and of the general sales department, connected with the company since 1903.

Otto Kuhn, of Passaic, N. J., head of the woolen department, connected with the company since 1905.

Camille Mehl, of Passaic, N. J., head of the yarn department, connected with the company since 1915.

Unusual nature of the directorship of this company.

The nature of the directorship of the company has from the date of its organization been exceptional and different from that of

most American companies in that this company's directors are actively engaged in the business and occupy responsible positions as officers and heads of departments. This has been the policy of the company from the date of its organization, it being the purpose of the founder, Mr. Eduard Stoehr, that the directors should be real directors, actually and personally interested in the business and giving their time and attention to it. The reward of the directors for the success of their work was to be accordingly. It will be noted that the directors in accordance with the provision of the by-laws receive as their compensation a sum equal to 32 per cent of the profits after deducting a 6 per cent dividend to the stockholders, and 5 per cent for reserve (art. 21, par. B, p. 15). This provision of the by-laws has been in force with immaterial variations from the date of the organization of the company in 1889. The variations relate to the percentage, which was 25 per cent, later 40 per cent, and then 32 per cent.

It will be noted that there are now two vacancies in the board. At the annual meeting in March, 1917, 10 directors were elected, being the gentlemen above mentioned and Eduard Stoehr, of Leipzig, Germany, and George Stoehr, of Leipzig, Germany. In the spring of 1917, after the declaration of war, the board, pursuant to Article V, paragraph 6, of the by-laws, declared two directorships vacant because of the disability of Eduard Stoehr and Geo. Stoehr, due to the state of war, and said vacancies have not been filled.

It will also be noted that all of the present directors and officers are residents of the United States.

Annual meeting of Botany.

The annual meeting of the stockholders of the company is held on the third Tuesday of March (Art. XIII, par. 1 of the by-laws), the next annual meeting taking place on March 19, 1918.

Stoehr & Sons (Inc.), New York City.

This is a New York corporation, organized in February, 1917, which is the successor to Stoehr & Sons, a partnership in New York City, which consisted of Eduard Stoehr, of Leipzig, Germany, and his three sons, H. E. Stoehr, of New York City, M. W. Stoehr, of Passaic, N. J., and Geo. Stoehr, of Leipzig, Germany.

Certificate of incorporation and by-laws.

A copy of the certificate of incorporation and of the by-laws of this company are submitted herewith.

Capital stock of Stoehr & Sons (Inc.).

Amount, \$250,000, consisting of 2,500 shares, par value \$100 each.

The business of the company—like that of its predecessor, the partnership of Stoehr & Sons—is dealing in wool; part of its funds were used to help finance the operations of Botany and it also made investments in other American enterprises.

The immediate occasion for the organization of the corporation in February, 1917, was this: It was assumed that if there was a declaration of war between the United States and Germany, the partnership would probably have to cease, being dissolved by reason of the alien enemy character of Eduard Stoehr, the father, and Geo. Stoehr, the brother, the results of such dissolution being of course obviously unfortunate and conceivably disastrous.

The partners retained the same proportional interest in the corporation as their interest in the partnership, namely, Eduard Stoehr, the father, 1,875 shares, Geo. Stoehr, the brother, 222.21 shares (being represented by trust certificates held by M. W. Stoehr for his father and brother)—in other words, somewhat more than four-fifths interest in parties resident in Germany.

Officers and directors of Stoehr & Sons (Inc.).

The certificate of incorporation and by-laws of the company provide for four directors. They are as follows:

Hans E. Stoehr, president.

Geo. E. Roehlig, vice president.

Max W. Stoehr, secretary and treasurer.

Alfred de Liagre, assistant secretary and assistant treasurer.

It will be noted that these directors and officers are the same gentlemen mentioned above as directors and officers, etc., of the Botany Worsted Mills, and that all of them are residents of the United States.

As has been pointed out, the founder of the Botany Worsted Mills was Eduard Stoehr.

As he is advanced in age (being 72 years) most of the active work during the past years has devolved on his sons. In this connection it may be stated generally that Eduard Stoehr, the father, and Georg Stoehr, the brother, were in charge of the Stoehr interests in Germany, and H. E. Stoehr and M. W. Stoehr of the interests in the United States. H. E. Stoehr represented his father and also Stoehr & Co., the Leipzig corporation, in this country.

Stoehr & Co., the Leipzig corporation, is a German stock company with its plant near Leipzig, Germany. Eduard Stoehr occupied a position similar to that of a chairman of the board of directors and Geo. Stoehr the position of chief executive officer similar to president.

In February, 1917, the board of directors of Stoehr & Co. [the Leipzig corporation] consisted of five members, viz: Eduard Stoehr, Hans E. Stoehr, Dr. Rosenthal, Paul Gulden, and Carl Beckmann.

Details as to stock control of Botany Worsted Mills.

The following will show the stockholdings in Botany Worsted Mills:

Shares of 84 alien enemy stockholders referred to in the list report made to the Alien Property Custodian by Botany Worsted Mills, Form No. 101, report No. 5263 (see typewritten list, schedule 2, showing 10,700 shares in names of alien enemy stockholders from which are to be deducted 1,205 shares referred to as having been purchased and paid for in 1916,

by stockholders resident in the United States), 9,495.

These 1,205 shares were bought and paid for in 1916 by stockholders residents in the United States. But on account of interrupted communication the particulars as to the numbers of the certificates and the names of stockholders are incomplete (see Report No. 5263, last page of Schedule 2).

The above-mentioned 9,495 shares include 2,900 shares of George Hirsch, of Gera, Germany, standing in the name of Thomas Prehn (see report made by Thomas Prehn to the Alien Property Custodian. The report number and trust number of this report we do not know).

The above 9,495 shares also include 1,400 shares of Friedrich Arnold, of Greiz, Germany, standing in the name of Thomas Prehn (see report by Thomas Prehn, No. 3052, trust No. 468).

Shares referred to in report No. 5263 (see last paragraph of typewritten list of Schedule 2, and also report No. 1869, trust No. 4017, Schedule 12, and a copy of contract annexed thereto. See also Schedule 2, last paragraph and Schedule 4 of report No. 5263). These shares were in the name of H. E. Stoehr and M. W. Stoehr, as trustees for said Stoehr & Co., the Leipzig corporation, the beneficial interest being in Stoehr & Co., 14,900.

Regarding the contract for the purchase of said 14,900 shares by Stoehr & Sons (Inc.) from Stoehr & Co., of Leipzig, Germany, it has been fully explained that the control of

Botany might be imperiled by a state of war, because the voting right on stock of alien enemies or in which alien enemies had the beneficial interests (as was the case with said 14,900 shares) was doubtful under the decisions of the courts, and if deprived of the voting right the control of Botany might be lost. This contract was made with reference to the control of Botany as between its stockholders and had of course no reference to the status of such control so far as the Alien Property Custodian is concerned. Such status is not affected whether such shares are in Stoehr & Co., the Leipzig corporation, or in Stoehr & Sons, Inc., the New York corporation. As we also stated verbally there have been no resolutions or other corporate action by Stoehr & Co., the Leipzig corporation, in confirmation of this transaction.

Additional shares belonging to Stoehr & Sons (Inc.), the New York corporation, 5,685.

Other stockholders in the United States, including the 1,205 shares referred to above, 5,920.

Total stock of Botany, 36,000.

To summarize: While Botany is managed in this country, considerably more than a majority of its stock is controlled by alien enemy interests within the meaning of the Alien Enemy Act; the total of the stock thus controlled (directly and indirectly) being 30,080 shares.

In accordance with the suggestion of Judge Brodhead and Mr. Duvall, we have stated in the foregoing letter the substance of the infor-

mation verbally stated by us and contained in the reports made to the Alien Property Custodian. Of course, if any further information is desired, we shall be glad to furnish it.

As to further conference.

We refer to the suggestion made by Judge Brodhead at our last interview regarding a future conference and shall be pleased to hear from you as to what date will be convenient to your office.

As to the executive committee.

In addition to the foregoing may we take the liberty of calling your attention to Article XXIII of the by-laws of Botany (last page) which provides for an executive committee? Through this committee effective control may be exercised over the affairs of Botany. The number of its members could, if desired, be reduced to three and its powers extended and such other appropriate restrictions adopted as may be deemed advisable.

Yours, very truly,

(Signed) HEYN & COVINGTON,

Counsel.

A carbon copy of the foregoing letter was introduced in evidence bearing the written approval of Stoehr & Sons (Inc.), by Hans, as president, and of Botany Worsted Mills, by Hans, as treasurer. Hans Stoehr also wrote two letters to Mr. Heyn under date of February 5, 1918. These letters were written to Mr. Heyn while he was in Washington for the pur-

poses above stated. One of these letters reads as follows (Rec. 244):

BOTANY WORSTED MILLS,
Passaic, N. J., February 5, 1918.

DEAR MR. HEYN: I wish to thank you for the satisfactory message, which you gave me over the telephone, reporting about your interview at the department of the Alien Property Custodian. I am sorry that the permit for my coming to Washington was not granted. It might have helped to straighten out any questions. At the same time the evidence and information, which you have, may be sufficient to enable you to bring this matter to a satisfactory conclusion.

Herewith I am inclosing another letter, containing the information asked for in regard to the holdings of stock in the Botany Worsted Mills, and Stoeck & Sons (Inc.). In addition I give you a list of the stockholders of the Botany Worsted Mills as follows:

	Shares.
Stoeck & Co.....	14,900
Hirsch & Arnold.....	4,100
Various German stockholders ¹	4,400
	<hr/> 23,400
Stoeck & Sons.....	5,685
Claimed by Prehn and others.....	1,305
Various stockholders in U. S. A.....	3,710
	<hr/> 10,690
Total.....	<hr/> 34,090

I also inclose list of papers mailed to you under separate cover, by registered mail, special delivery.

¹ Including about 1,000 shares of Australian stockholders.

I shall be at the New York office all day to-morrow, Wednesday, February 6, in case you wish additional information.

With kindest regards to both Mr. Lenssen and yourself, I am,

Sincerely, yours,

(Signed)

HANS E. STOEHR.

It will be noted that Hans Stoehr, in the foregoing letter, lists the 14,900 shares in question as belonging to *Stoechr & Co.*, and in the group of alien enemy owned shares. The name of "*Stoechr & Co.*" is employed by him as well as by Heyn & Covington in their letter as the name of the German corporation. The full name of that corporation is *Kammgarnspinnerei Stoechr & Co. Aktiengesellschaft*. It will be noted too in the letter of Hans to Heyn, above set out, that he lists *Stoechr & Sons* as owning only 5,685 shares, and so there can be no doubt of his intention to admit the complete ownership by the German corporation (*Stoechr & Co.*) of the 14,900 shares. The other letter of Hans Stoechr to Mr. Heyn bears date also of February 5, 1918. It says merely that a majority of the capital stock of Botany Worsted Mills is owned by alien enemies without giving particulars, but the classification in the quoted letter and all the evidence in the record shows that it was impossible for alien enemies to have owned a majority of the shares without including the 14,900 as a part of that ownership.

There is no evidence in the record tending to show any general authority in Hans to sell the stock of the

German corporation in Botany—certainly no specific authority to sell to himself and family (the relation of the family to the several corporations has already been stated) on terms and at a price to be fixed by himself and there is no evidence of ratification or even of knowledge on the part of the German company, although at that time communication with Germany was open, but the messages were required to be in plain language, the use of code words being prohibited. The sales contract was signed on behalf of the German corporations by Hans without official designation.

Acts subsequent to sales contract and connected therewith.

On February 20, 1917, there was noted in the record book of stock transfers kept by Botany, the transfer to Stoehr & Sons (Inc.), of the 14,900 shares in question. No new certificates were issued to Stoehr & Sons (Inc.). This notation was in the usual form prescribed for the transfer of shares of European shareholders by the deposit of duly transferred certificates with an authorized representative of Botany at Leipzig as previously explained. It bears the notation "By deposit of certificates with" (printed) "Georg Stoehr" (rubber stamp). There was no evidence in possession of Botany and there is no evidence in the record of any transfer of these certificates or of any deposit thereof with Georg Stoehr or anyone else. The notation of transfer, so far as the transfer record itself shows, was thus

made in order to appear to be regular and in accordance with the by-laws.

It is the only case in the entire history of the company where such a transfer was noted, with the exception of one other simultaneously made, next to be mentioned, in the absence of a certificate in the prescribed form from a director or the vice treasurer of Botany, resident at Leipzig, that the original certificates duly transferred had been deposited with such officer there. This notation of transfer was made by the custodian of the record book upon the order of Hans Stoehr. Simultaneously the stock standing in the name of Stoehr & Sons, the partnership, was noted as transferred to Stoehr & Sons (Inc.). Certificates for only 1,290 shares were produced. They were the only certificates in the United States. The method of notation was the same as that just explained, but the necessary advice respecting the 4,400 shares in Germany was lacking. This notation was also made upon the order of Hans Stoehr. At the same time there was opened on the books of Botany, and by the direction of Hans, a special account with the German corporation in which it was credited with \$5,000, being the consideration recited in the sales contract as paid to the German corporation. A like amount was simultaneously charged on the books of Botany to Stoehr & Sons (Inc.). These entries also were made upon the orders of Hans Stoehr. Shortly thereafter, again upon the orders of Hans Stoehr, a notation was made upon the regular account of the Botany books with Stoehr & Sons,

to the effect that the partnership had become incorporated on February 20, 1917, under the corporate name of Stoehr & Sons (Inc.). On February 20, 1917, an entry was also made on the books of Stoehr & Sons (Inc.) in its current account with Botany, crediting Botany with \$5,000 on account of the purchase of the shares of the German corporation. There was no actual payment of the \$5,000 recited as a consideration for the sales contract and the book entries mentioned cover all that was done in respect thereof. Stoehr & Sons (Inc.) have continuously since February 20, 1917, and through Hans or Max, voted the 5,690 shares in Botany and continuously through Hans or Max voted the 14,900 shares until they were demanded by the Alien Property Custodian. However, no dividends on those 14,900 shares—and there were two declared after the sales contract and transfer and prior to the demand of the Alien Property Custodian—were paid to Stoehr & Sons (Inc.), but were, under the orders of Hans Stoehr, simply credited and in a special account on the books of Botany to Stoehr & Sons (Inc.). Subsequent to the demand of the Alien Property Custodian they were paid to the Alien Property Custodian.

Financial condition of Stoehr & Sons (Inc.).

After the transaction between the corporation and the partnership respecting the assets and liabilities of the partnership above mentioned, the capital stock of the corporation was \$250,000. The assets of the partnership constituted the entire assets of the

corporation. Its balance sheet listed as assets 6,090 shares of Botany at a book value of \$975,857 (about \$160 per share), but certificates for only 1,290 shares were in this country. It follows that 4,800 shares having a book value of about \$775,000 were not available, and presumably a sale of one lot in order to buy another would yield no advantage. The demand liabilities of the corporation at its organization exceeded \$1,000,000. Among such liabilities was an indebtedness to the German corporation of about \$775,000. Included in this amount was an item for about \$270,000 owed by Botany to the German corporation near the end of the year 1916, when further remittances became impossible. This amount, upon the orders of Hans Stoehr, was then transferred on the books of Botany to Stoehr & Sons, the partnership. Stoehr & Sons (Inc.) issued 10-year debentures to the amount of \$1,000,000, of which \$775,000 were set apart for the German corporation in pretended payment of the indebtedness to it and the balance for Eduard, Georg, Hans, and Max. There is no evidence of authority from the German corporation or from Eduard or Georg Stoehr for this transaction. Eduard and Georg are large creditors, too, and their debts were pretended to be paid by these debentures. It will hereafter appear that the purchase price fixed in the sales contract for the 14,900 shares must have been expected to be, at the time the sales contract was made, in the neighborhood of \$5,000,000. It will be urged by the defendants that, at the time the

sales contract was made, Stoehr & Sons (Inc.) was without the ability and without reasonable prospect of ability to pay the purchase price. In this connection it should be noted that Stoehr & Sons (Inc.) made no effort or offer at any time to pay the purchase price or any part thereof, although an installment fell due February 20, 1918—about six weeks prior to the demand for the shares by the Alien Property Custodian and several weeks prior to the installation of directors in Stoehr & Sons (Inc.), who were nominated by the Alien Property Custodian.

The purchase price and value of shares in question.

It will be seen by reference to the sales contract that the purchase price was payable in five annual installments and based upon the book value of the stock at the close of the fiscal year of Botany preceding the due dates plus dividends received prior to the due date on any stock not theretofore paid for. The evidence shows that the book value of the 14,900 shares of Botany at the end of its first fiscal year following the execution of the sales contract (Nov. 30, 1917) was \$4,737,957.46. One-fifth of this amount fell due February 20, 1918, and without taking dividends into account was \$947,567.49. This book value did not include good will or other like assets. There is no direct evidence regarding the market value or probable value of the shares of Botany, and it will be urged that there is no evidence tending to show that the consummation of the purchase would be in any way advantageous to Stoehr & Sons (Inc.).

Directors of Stoehr & Sons (Inc.) and their action.

Subsequently to the visit of Heyn and Lenssen to Washington, Messrs. Garvan, Wallace, and Duvall were installed as directors in the place of Hans Stoehr (then dead), Rohlig, and De Liagre. Max remained upon the board until October, 1918. Directors nominated by the Alien Property Custodian were also installed in Botany. In both cases the directors were duly installed and the men selected for the service by the Alien Property Custodian were men of high standing in the business world. The original directors of Stoehr & Sons (Inc.) took no action respecting the sales contract subsequent to its authorization on February 20, 1917. When the first installment of the purchase price under the sales contract fell due the original directors were in office and Hans Stoehr was alive (Feb. 20, 1918). The directors nominated by the Alien Property Custodian were installed in March, 1918. Neither have they taken any affirmative action.

Prior to the acceptance of the resignation of Max from the board of Stoehr & Sons (Inc.), possibly in August, 1918, the sales contract was, however, mentioned at a meeting of the board which was attended by Max Stoehr. Mr. Quinn, the counsel of the company, stated that in his opinion the sales contract was without validity and was entered into for the purpose of covering up the real ownership of the stock. He also stated that Stoehr & Sons (Inc.) was without financial ability to perform. No comments were made by Max Stoehr and no appli-

cation was ever made by him or anyone else to the board of Stoehr & Sons (Inc.) to take any action whatsoever respecting the sales contract. He has sought no relief within the corporation before bringing this action. Max says in his testimony that he made no reply to Quinn because he desired to remain upon the board and because his resignation, pursuant to the advice of Heyn, had from the date of the installation of the directors nominated by the Alien Property Custodian been in their hands for acceptance at their will. He says furthermore that Heyn's advice was coupled with the statement that such were the requirements of the Alien Property Custodian and that grave consequences might follow a failure to comply.

Mr. Palmer, the then Alien Property Custodian, testified that the directors nominated by him in this and all other companies were chosen for their experience and ability and that they were free to exercise their business judgment and discretion concerning all matters affecting that interest of the corporations they represented and that he impressed upon them the fact that he looked to them to perform their duties fully and freely. He says that he would have expected the directors nominated by him in Stoehr & Sons (Inc.) to take such action as they might deem proper respecting the enforcement of the sales contract in the event it was their judgment that it was proper and right to do so. The directors were James N. Wallace, president of the Union Central Trust Co., a man of large affairs and high standing; Francis

P. Garvan, then Chief of the Bureau of Investigation of the Alien Property Custodian and now Alien Property Custodian; and Andrew B. Duvall, then of the office of the Alien Property Custodian.

Seizure of shares in question by Alien Property Custodian.

The shares in question were originally demanded or seized by the Alien Property Custodian under date of April 5, 1918. They were again demanded and seized under date of February —, 1919, pursuant to the amendment to the Trading With the Enemy Act of November 4, 1918. Stock certificates were issued to the Alien Property Custodian subsequent and pursuant to the demand of February, 1919, in accordance with the requirements of the amendment of November 4, 1918, and they are now in possession of the Alien Property Custodian.

Threatened sale of shares.

At the time this suit was instituted the Alien Property Custodian had advertised for sale 24,410 shares as belonging to alien enemies, being the 14,900 shares in question and 9,510 belonging to miscellaneous alien enemies. There were 1,290 additional shares advertised to be sold at the same time and price as the property of Stoehr & Sons (Inc.). These 1,290 shares were offered at the request of the directors of Stoehr & Sons (Inc.), and were all the shares claimed by Stoehr & Sons (Inc.) for which there were certificates in the United States.

POINT I.

The Act of Congress, known as the Trading With the Enemy Act, was passed under the express power given to Congress by section 8 of Article I of the Constitution.

By that Act Congress was given express power to "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water," and to make all rules which shall be necessary and proper to carry into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

To carry out this express power and to make the rules concerning "captures on land and water," the Trading With the Enemy Act was passed. That Act provides in section 7-a that every corporation incorporated in the United States issuing the shares or certificates representing beneficial interests shall transmit to the Alien Property Custodian a full list, duly sworn to, of every officer, director, or stockholder known to be, or whom the representative of such corporation has reasonable cause to believe to be, an enemy or ally of an enemy, resident within the territory or a subject or citizen residing outside of the United States, or any nation with which the United States is at war. The President may also require a similar list to be transmitted of all stock or shares owned on February 3, 1917, by any person now defined as an enemy or ally of an enemy, or in which any such person has any interest, and that any per-

son in the United States who holds, or has or shall hold or have, custody or control of any property, beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of an enemy, or of any person with whom he may have reasonable cause to believe to be an enemy or ally of an enemy, to report the fact to the Alien Property Custodian by written statement, under oath, containing such particulars as such custodian shall require. The section further provides that an enemy or ally of an enemy may defend by counsel any suit in equity or action at law which may be brought against him.

Subdivision c of this section provides that if the President shall so require, any money, or other property owing or belonging to, or held for, by, or on account of, or on behalf of, or for the benefit of an enemy, or ally of an enemy, which the President after investigation shall determine is so belonging or so belongs, or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian.

Subdivision e further provides that no person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.

By section 8 of Article I of the Constitution, Congress is given express power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. Captures on land and water were thus treated as part of the

power to declare war, part of the war power vested in Congress, and Congress was expressly given power to make all laws which shall be necessary and proper to carry into execution the foregoing powers. Any rules of law that Congress might make concerning captures on land and water were within the express power granted to Congress. Whether Congress should declare proceedings *in rem* should be instituted in the name of the United States in any District Court of the United States, or should declare that the President should seize the property of enemies within the territory of the United States and hold the same, or the proceeds thereof, as Congress should afterwards provide, was within the discretion of Congress; and the provision in the law, section 9 of the Act, which allows a person claiming to own property to claim it from the President and to bring an action in the courts of the United States for its recovery, was entirely within the discretion of Congress, and not outside of the power granted to Congress to make rules concerning captures on land and water.

During the late rebellion Congress passed an Act on August 6, 1861, c. 60 (12 Stat. 319) which was entitled "An Act to confiscate property used for insurrectionary purposes." The fifth section of that Act provides that to insure a speedy determination of the "present rebellion it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to

apply and use the same, and the proceeds thereof, for the support of the Army of the United States." The Act further provides that to secure the condemnation and sale of any such property after the same shall have been seized, proceedings *in rem* should be instituted in the name of the United States in any District Court thereof, or in any Territorial Court. That question came before this court in the case of *Miller v. United States* (11 Wall. 268, at p. 296). There the court say:

It [the Act of Congress] contemplated that every kind of property mentioned could be seized effectually in some mode. It had in view not only tangible property, but that which is in action. It named stocks and credits; but it gave no directions respecting the mode of seizure. It is, therefore, a fair conclusion that the mode was intended to be such as is adapted to the nature of the property directed to be seized, and in use in courts of revenue and admiralty. The modes of seizure must vary.

The court then proceeded at page 304 to consider the objection on behalf of the plaintiff in error that the Act of Congress under which the proceedings to confiscate the stock had been taken were not warranted by the Constitution and were in conflict with some of its provisions and the court held that, if they were an exercise of the war powers of the Government, it is clear that they were not affected by the restrictions imposed by the Fifth and Sixth Amendments; that the question was,

therefore, whether the action of Congress was a legitimate exercise of the war power. And the court, after referring to the power, says (p. 305):

Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right. If there were any uncertainty respecting the existence of such a right it would be set at rest by the express grant of power to make rules respecting captures on land and water. * * * It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now, what is that right, and why is it allowed? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter

what his nationality. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation.

The court then determined the question as to whether the Acts of 1861 and 1862 were an exercise of this war power—the power of confiscation—or whether they must be regarded as mere municipal regulations for the punishment of crime.

In the *Selective Draft cases* (245 U. S. 366) the court had before it the provision of an Act of May 17, 1917, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States." It is there said, at page 377:

But the proposition simply denies to Congress the power to raise armies which the Constitution gives. That power by the very terms of the Constitution, being delegated, is supreme. Article VI. In truth the contention simply assails the wisdom of the framers of the Constitution in conferring authority on Congress and in not retaining it as it was under the Confederation in the several States.

And this decision was reaffirmed in *Cox v. Wood* (247 U. S. p. 3). It is said in that case (p. 6):

(a) That the power of Congress to compel military service and the duty of the citizen to render it when called for were derived from the authority given to Congress by the Constitution to declare war and to raise armies. (b) That those powers were not qualified or restricted by the provisions of the militia clause, and hence the authority in the exercise of the war power to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced from the militia clause. And (c) that from these principles it also follows that the power to call for military duty under the authority to declare war and raise armies and the duty of the citizen to serve when called were coterminous with the constitutional grant from which the authority was derived and knew no limit deduced from a separate, and for the purpose of the war power, wholly incidental, if not irrelevant and subordinate, provision concerning the militia found in the Constitution.

Applying the principles thus established, the Constitution having delegated the power to make rules concerning captures on land and water, any act that the Congress passes which is reasonable and proper to accomplish that purpose and has to do with captures of enemy property on land or water as part of the war power was within the constitutional power of Congress.

The Act in question authorized the custodian, an officer of the United States, to take into his pos-

session and control all property owned by enemies and provides a method by which he shall determine the property which is thus enemy owned and which he is required to take into his possession. The rules adopted by Congress for the determination of that question are clearly within the constitutional powers vested in Congress by the provision in question. The Act by section 9 provides that when any property thus taken into the custody of the custodian that is claimed by a person not an enemy, such person may prosecute an action in the United States District Court to recover possession of the property for which claim is made, and the custodian shall then keep the property as it is in existence at the time the action was commenced and respond to any judgment of the court which determines its ownership. Here is a perfect protection for every one who claims an interest in property owned by an enemy, and it provides for a judicial determination of that action and provides for any person claiming the property "due process of law." The Act also provides that the custodian may sell the property and the proceeds, when deposited in the Treasury of the United States, shall stand in place of the property thus sold, and the custodian proceeded to carry out this provision of the statute by advertising the property for sale. But when the action was commenced the custodian voluntarily refrained from making a sale, and the stock claimed by this appellant is now in the possession of the custodian awaiting the decision of this court.

The question as to the constitutionality of the power of Congress to declare a sale of property claimed by citizens of the United States is not therefore involved. The Act does not itself attempt to determine the rights of a claimant of the property. It provides for the custody of the property and authorizes the custodian to take into his possession any property that he determines is enemy-owned. This power is clearly within the power of Congress, and this power is the only power that the custodian has exercised in this case.

It is the *custody* of the property that is provided for, and the statute provides that any person in the United States who holds or has, or shall hold or have custody or control of any property, beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of an enemy, or of any person whom he may have reasonable cause to believe to be an enemy or ally of an enemy, shall report the fact to the Alien Property Custodian, and if the President shall require any money or other property owing or belonging to, or held for, by or on account of, or on behalf of an enemy or ally of an enemy, not holding a license, which the President after investigation shall determine is so owing or so belongs, or is so held, shall convey, assign, transfer, and deliver or pay it over to the Alien Property Custodian. The property of the enemy having been delivered to the custodian, the Act then provides by section 9 the method by which a person not an enemy or ally of an enemy shall establish his claim to the property. This *cus-*

tody in the Alien Property Custodian is no more than the marshal has under a writ of attachment, or a receiver in an action for the foreclosure of a lien, or any other legal proceeding by which the court takes into its possession the property involved in the suit, which is to be determined by the final judgment in the action.

Provision is made by section 9 for the asserting of any claim by any person not an enemy or ally of an enemy to recover possession of the property. In the action in which the appellant filed his bill the judgment that he asked for was that the property be declared not to be the property of an enemy or ally of an enemy, but that it be decreed that the defendant A. Mitchell Palmer, as Alien Property Custodian, be ordered, adjudged and decreed to release and surrender all and singular the shares of stock of the defendant Botany Worsted Mills owned by the defendant Stoehr & Sons (Inc.), seized and taken by him as aforesaid, and to account for his acts in and about his attempted possession and control of such shares of stock and in and about the care and conduct of said property, business, and affairs of the said defendant corporation during the period of his possession thereof. (Rec. 13.)

The appellant Stoehr & Sons (Inc.), thus has had its day in court, and has been permitted to, and did, offer such evidence as it had to prove its claim that the property thus taken into the custody of the Alien Property Custodian was not the property of an

enemy or ally of an enemy, but was the property of a New York corporation.

Such an action is provided for by section 9 of the Act. That provides that any person not an enemy or ally of an enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian thereunder, and held by him, or by the Treasurer of the United States, may file with the said custodian a notice of claim, under oath, and in such form, and containing such particulars as said custodian shall require, and that the President, if application be made therefor by the claimant, may, with the consent of the owner of said property and of all persons claiming any right, title, or interest therein, order the payment, conveyance, transfer, assignment, or delivery by said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, of the interest therein to which the President shall determine such claimant is entitled. Provided that no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant, to establish any right, title, or interest which he may have in such money or other property; that if the President shall not so order, within 60 days after the filing of such application, or, if the claimant shall have filed a notice as above required and shall have made no application to the President, such claimant may, at any time before the expiration of six months after

the end of the war, institute a suit in equity in the District Court of the United States for the district in which such claimant resides, or if a corporation, where it has its principal place of business, to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant, to establish the right, interest, title, or debt so claimed, and if suit shall be so instituted, then the money or other property of the enemy or ally of the enemy against whom such interest, right, or title is asserted or debt claimed, shall be retained in the custody of the Alien Property Custodian or in the Treasury of the United States as provided in the Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the Alien Property Custodian or Treasurer of the United States, or order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated; and except as therein provided the money or other property conveyed, transferred or delivered, or paid to the Alien Property Custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

The *custody* by the Alien Property Custodian did not deprive the New York corporation of property without due process of law, as provided for by the Fifth Amendment to the Constitution. It is provided that after investigation as to whether the

property is owned by an enemy or ally of an enemy, or whether an enemy or ally of an enemy has a beneficial interest therein, if the President determine that it is, then the Alien Property Custodian is to take it into his custody, and any person not an enemy or ally of an enemy has full power and authority to sue for and recover such property by an action provided for by section 9 of the Act.

The appellant herein commenced such an action and the property has remained in the hands of the custodian since the action was commenced. He had full liberty to assert his claim and prove that the corporation had been deprived of its property without due process of law. This is an entirely reasonable Act and was passed under the express power given to Congress concerning captures on land and water, by section 8 of Article I of the Constitution. And there having been an express grant of power to Congress—the power to make rules concerning captures on land and water—any rule or Act of Congress which is reasonable to accomplish that purpose is within the express power of Congress granted by this provision. It is under the power vested in Congress for the efficient prosecution of the war that this Act was passed. It was to effectuate the capture of all enemy property in the United States and confiscate it to the United States that Congress considered the provisions of this Act necessary to accomplish that purpose.

This court has sustained the action of Congress in passing the Selective Draft Law (245 U. S. 366);

the Espionage Act (*Schenck v. United States*, 249 U. S. 47; *Schaefer v. United States*, 251 U. S. 466); the Federal control of railroads (*Northern Pacific Ry. Co. v. North Dakota*, 250 U. S. 135, and in *Dakota Cent. Tel. Co. v. South Dakota*, 250 U. S. 163); to the United States taking possession of the cable lines (*Commercial Cable Co. v. Burleson*, 250 U. S. 360; *Dakota Central Telephone Co. v. State of South Dakota*, 250 U. S. 163); the War Time Prohibition Act (*Hamilton, Collector of Internal Revenue v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146).

Under this statute it is made the duty of every custodian of enemy-owned property to report it to the Alien Property Custodian. It is on that report that the custodian acts in determining what is enemy-owned property. In this case the corporation which the appellant claims has the title to the property was notified and appeared before the Alien Property Custodian, and submitted its claim, and the facts upon which it was based. The custodian determined that the property was owned by an enemy and took it into his possession, and then the complainant filed this bill to obtain possession of the property.

The appellant, as we understand, did not claim in the court below that the whole Trading With the Enemy Act is unconstitutional, but only claimed that the President's determination as to the right of the appellant, or Stoehr & Sons (Inc.) to recover these shares of the Botany Worsted Mills was not conclusive upon Stoehr & Sons (Inc.) and was a violation of

the Federal Constitution. But nowhere in the court below did the appellants make any such claim. The appellant filed his claim with the Alien Property Custodian under section 9 of the Trading With the Enemy Act. That claim is annexed to the bill as Exhibit 3 (printed at p. 18), and after the bill had been filed he filed another claim with the Alien Property Custodian, which was entitled "Notice of claim," pursuant to section 9 of the Trading With the Enemy Act, and that was annexed to the supplemental bill and is printed at page 22 of the record. That claim not having been complied with, he filed this bill alleging the ownership of the stock by Stoehr & Sons (Inc.), a New York corporation. So, therefore, so far as the appellant objects to the constitutionality of the provisions of the Trading With the Enemy Act, those provisions were never claimed by the appellant or sought to be enforced by the court. The appellant sought his remedy under the Trading With the Enemy Act. He filed a claim with the Alien Property Custodian and filed his bill in the United States Court, as provided for by that Act. His whole claim in the court below, and in this court, is that he is proceeding under that Act and is entitled to have the judgment of the court in his favor, because of the provisions of the Act. So he certainly can not claim that the Act is unconstitutional and void and yet get a judgment under the Act adjudicating that the shares of stock in question are the property of the New York corporation. He had an election to sue for the property on the ground that the taking of it

was unlawful, because the custodian was not authorized by any valid law of the United States to take possession of the property; or he had an election to proceed under the Act, make a claim against the custodian under the Act, and when that claim was not complied with to file a bill under section 9 of the Act to recover possession of the property.

These are inconsistent remedies, and an election to claim under the Act would defeat his claim if the Act were absolutely void. As he filed his claim under the Act, and filed the bill under the Act, and sought to procure an adjudication in the court below, as provided for by the Act, the only relief that he can get in this suit is that provided for by the Act, and if his action was not sustainable under the Act, the bill was properly dismissed.

In the assignment of errors by the appellant (p. 321), by the first assignment it is alleged that the court erred in refusing to hold that the Act of Congress known as the Trading With the Enemy Act, approved October 6, 1917, and the amendments thereto approved March 28, 1918, and November 12, 1918, in so far as the same undertook to permit the seizure of the property of Stoehr & Sons (Inc.), a New York corporation *ex parte* and without affording to it a hearing or an opportunity to be heard, and in so far as they confer upon the Alien Property Custodian the right to sell the property so seized without proceeding before a judicial tribunal, are unconstitutional. By the second assignment of error, that the court erred in refusing to hold that in so far as the Alien

Property Custodian undertook, *ex parte* and without legal proceeding, based upon notice of hearing or an opportunity to be heard in court, to take possession of the shares of stock of the Botany Worsted Mills belonging to Stoeck & Sons (Inc.), and to determine that such shares belonged to the Leipzig corporation, or any other enemy, his action was null and void, and in violation of the due process clause of the Constitution of the United States.

There is, therefore, no claim, either in the court below, or on the assignments of error, that the mere taking and custody were a violation of the constitutional rights of either the appellant or the New York corporation. It appears by the record that the appellant and the corporation whose rights he seeks to enforce, had notice and made a report to the Alien Property Custodian as to the status of these shares. He was heard by the custodian, and it was after such hearing that the custodian took possession of the property. He then proceeded under the Act to file a claim for the property, and filed this bill in the United States District Court, and the court did not hold that any action of the custodian, or any determination of his, was a conclusive adjudication as to the title or interest of Stoeck & Sons (Inc.), a New York corporation, to the stock in question.

So it is submitted that there is no constitutional question submitted on this appeal. The rights of the appellant and the corporation which he assumes to represent were determined by the judgment from which this appeal is taken, and all of the testi-

mony that was produced on the trial as to the title of the New York corporation to the stock in question shows that the only substantial question presented on this appeal is whether the appellant proved that the stock in question was the property of the New York corporation, and whether the New York corporation has a right to a judgment transferring the stock to it under section 9 of the Trading With the Enemy Act.

In the brief filed by the appellant in the court below the only question as to the constitutionality of the Trading With the Enemy Act is contained in the sixth, seventh, and eighth points. The fifth point is that, in so far as the Alien Property Custodian undertook, *ex parte* and without legal proceeding based upon notice of hearing or an opportunity to be heard in court, to take possession of the shares of stock of the Botany Worsted Mills belonging to Stoeck & Sons (Inc.) and to determine that such shares belonged to the Leipzig company, or any other enemy, his action was null and void and in violation of the due process clause of the Constitution.

As we have before indicated, Stoeck & Sons (Inc.) had notice before the determination of the Alien Property Custodian and submitted its claim to him, and his determination only resulted in the custody of the property, the ownership of which was subsequently claimed by the New York corporation in an action in this court under the Trading With the Enemy Act.

The seventh point is that the contention that the Trading With the Enemy Act divested the title of the New York company under its contract of February

20, 1917, is untenable, on the ground that if that interpretation can be given to the Act the Act constitutes a deprivation of property without due process of law; and point eight contends that the intended sale of the shares of stock belonging to Stoehr & Sons (Inc.), in the absence of an adjudication in a proceeding duly instituted in accordance with due process, would be a violation of this constitutional right.

It was not claimed in the court below, nor is it claimed here, that anything in the Trading With the Enemy Act divested the New York corporation of its rights in these 14,900 shares of the Botany Worsted Mills Co. What is contended here is that the Act divested the Leipzig corporation and the members of the Stoehr copartnership, who were German citizens and residents of Germany, of their legal or beneficial interest in these 14,900 shares of stock, and that Stoehr & Sons (Inc.), the New York corporation, had no legal title to the stock and had no beneficial ownership in it, and therefore the New York corporation was not entitled to recover the stock from the Alien Property Custodian. No constitutional rights of the New York corporation, or of the plaintiff as a stockholder in that corporation, have been impaired, or title to the stock divested by any adjudication, except the judgment now before the court, and by this judgment it is determined that Stoehr & Sons (Inc.), the New York corporation, had no title to, or beneficial interest in, this stock, and on that finding the bill was dismissed.

POINT II.

The right of the United States to confiscate and capture enemy property in the United States is not presented on this appeal, but the Constitution expressly gives to Congress, by section 8 of Article I, the power to declare war and make rules concerning captures on land and water, and also the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and the Trading With the Enemy Act, so far as it provides for the capture and sequestration of all property of enemies, is a valid exercise of that power.

The power of the United States to capture enemy property within the United States is settled.

Miller v. United States, 11 Wallace, 268, at p. 304.

Tyler v. Defrees, 11 Wallace, p. 331.

And that does not seem to be disputed by the appellant.

The following propositions have been established:

First, by the law of nations war in and of itself invests every nation with full right to take and confiscate the property of his enemy wherever found.

The Sally, 8 Cranch, 382.

Brown v. United States, 8 Cranch, 110.

Miller v. United States, 11 Wall. 268.

Second, the individuals who compose a belligerent State are one with it and are conclusively regarded as the enemies of its opponent. Their property is to be considered as the property of the nation. It belongs in legal contemplation to the State from the right which the State has over the property of its

citizens, and from the fact that it constitutes a part of its riches and augments its power.

The Rapid, 8 Cranch, 155.

The Venus, 8 Cranch, 253.

Third, whether the right of capture and confiscation shall be exercised, and if so by what agency and to what extent, rests with the sovereign and is a matter of internal policy. In the case of the United States the power to determine this question of policy—"to make rules respecting captures on land and water"—is vested in Congress. *Brown v. United States*, 8 Cranch, 110.

POINT III.

Under the Trading With the Enemy Act the Alien Property Custodian acquired all enemy interest in and right to the 14,900 shares of the Botany Worsted Mills, either legal or equitable, and all beneficial interests in such stock or right to enforce any right to it.

By subdivision c of section 7, it is expressly provided that if the President shall so require, any money or other property owing or belonging to, or held for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of an enemy, not holding a license granted by the President, which the President after investigation shall determine is so owing, or so belongs, or is so held, shall be conveyed, transferred, assigned, delivered and paid over to the Alien Property Custodian.

By section 12 of the Act, as amended on March 28, 1918 (40 Stat. 459, 460), it is provided that all other

property of an enemy or ally of an enemy, conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian, shall be safely held and administered by him, except as hereinafter provided; that the Alien Property Custodian shall be vested with all the powers of a common law trustee in respect to all property, other than money, which shall come into his possession in pursuance of the provisions of the Act, and in addition thereto, and acting under the supervision and direction of the President and under such rules and regulations as the President shall prescribe, may manage such property and do any act or thing in respect thereto, or make any disposition thereof, or of any part thereof, by sale or otherwise, and exercise any right which may be or become appurtenant thereto, or to the ownership thereof, in like manner as though he were the absolute owner thereof.

By an amendment approved November 4, 1918 (40 Stat. 1020), subdivision c of section 7 of the Trading With the Enemy Act was amended by providing that whenever such property shall consist of shares of stock or other beneficial interests in other corporations, associations, or companies, or trusts, it shall be the duty of the corporation, association or company or trustee or trustees issuing such shares, or any certificates or other instruments representing the same, or any other beneficial interest, to cancel upon its, his, or their books all stock or other beneficial interests standing upon its, his, or their books, in the name of any such person or persons, or held for or on account

of, or on behalf of, or for the benefit of any such corporation or person. The sole relief and remedy of any person having any claim or any money or other property, conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him, shall be that provided by the terms of the Act.

Under this Act the Alien Property Custodian demanded of the Botany Worsted Mills the transfer to him of these 14,900 shares of stock, having after investigation determined that Eduard Stoehr and Georg Stoehr were enemy aliens, and that the Leipzig corporation, of Leipzig, Germany, was an enemy not holding a license granted by the President and by that demand the Alien Property Custodian seized every such right, privilege, and benefit created in favor of, and granted to, said enemy by said contract, including every power and authority thereover which might or could be exercised by said enemy. (Demand dated the 26th of February, 1919, p. 271 of the record.)

By other demands the Alien Property Custodian took into his possession 14,900 shares of the stock of the Botany Worsted Mills standing in the name of, or the beneficial interest in which vested in, the Leipzig corporation. (Demand April 5, 1918, pp. 202 to 205 of the record.)

By similar demand the Alien Property Custodian took into his possession all of the interest of the German enemy aliens in the stock of Stoehr & Sons (Inc.).

(Demand printed at pp. 258, 259, and 260 of the record.)

And by another demand he made demand for al money and property mentioned and described in the report made by the complainant on December 3, 1917, as owing or belonging to, or held for, by or on account of, or on behalf of, or for the benefit of, George Stoehr, of Leipzig, Germany. And by another demand (printed at pp. 264 and 265 of the record) demand was made for the capital stock of Stoehr & Sons (Inc.) standing in the name of the complainant as trustee for Eduard Stoehr, of Leipzig, Germany, and George Stoehr, of Leipzig, Germany. By another demand made by the Alien Property Custodian (printed at p. 267 of the record) demand was made for the stock owned by these two German enemies in Stoehr & Sons (Inc.). By another demand (printed at p. 269) he demanded all interest in Stoehr & Sons (Inc.) in all the property of the copartnership of Stoehr & Sons (demand printed p. 269.)

All of this stock was transferred to the Alien Property Custodian and is now in his possession. Thus all interest of every description, beneficial or otherwise, or in trust for the German enemies, was confiscated by the United States and taken into its possession. All right to enforce the contract in relation to these 14,900 shares was confiscated to the United States and was taken into the possession of the Alien Property Custodian. All right to enforce any contract in relation to these shares of stock became vested in the United States. Thus

any right of the Leipzig corporation in and to the 14,900 shares of stock of the Botany Worsted Mills had become the property of the United States, and under the Trading With the Enemy Act the custodian was, by subdivision c of section 7, as amended November 4, 1918, authorized to have such stock transferred to him, representing the United States, and the sole relief and remedy of any person having any claim to any money or other property theretofore or thereafter conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian, or required so to be, or seized by him, is that provided for by the terms of that Act.

The custodian had determined that the property was the property of the Leipzig corporation, after notice to, and report by the officers of Stoehr & Sons (Inc.), and based upon the report made by that corporation to the Alien Property Custodian, and by the Act itself, anyone claiming ownership to that stock, had to proceed under the Act to assert its claim or right by the action provided for by section 9 of the Act.

POINT IV.

Under the contract on which this claim is based (which is annexed to the bill as Exhibit 1, printed at page 14 of the record), Stoehr & Sons (Inc.), a New York corporation, never acquired either the legal title, or the beneficial ownership, of the 14,900 shares of stock of the Botany Worsted Mills.

Prior to the 20th day of February, 1917, it is conceded that the Kammgarnspinnerei Stoehr & Co.

Aktiengesellschaft, herein called the Leipzig corporation, was the owner of these 14,900 shares of the stock of the Botany Worsted Mills. Prior to 1915 these shares stood on the books of the Botany Worsted Mills corporation in the name of the Leipzig corporation. In 1915 these shares of stock were caused to be transferred on the books of the Botany Worsted Mills, 10,000 to Hans E. Stoehr, as trustee, and 4,900 to Max W. Stoehr, as trustee, but the complete beneficial interest therein remained in the German company. The war between Great Britain and France and the German Empire, then existing, it was feared that the voting right to this stock would be interfered with if it continued in the name of the Leipzig corporation, and it was therefore transferred to these trustees, in order to enable them to vote at the annual meeting of the corporation. After the severance of diplomatic relations between the United States and Germany, in February, 1917, and in contemplation of the declaration of war between the United States and Germany, Stoehr & Sons (Inc.) was organized under the laws of the State of New York, and all interest of the copartnership theretofore existing was transferred to this corporation.

Immediately thereafter, and on February 20, 1917, an instrument was prepared, which purported to be a contract between the Leipzig company and the New York corporation, relating to these 14,900 shares of stock of the Botany Worsted Mills. That instrument was in the form of an agreement made between the Leipzig corporation of the first part, and Stoehr &

Sons (Inc.), a New York corporation, party of the second part. The trustees in whose name this stock was held on the books of the Botany Worsted Mills, was not a party to that agreement. The agreement witnesseth that the Leipzig corporation was beneficially interested in 14,900 shares of the capital stock of the Botany Worsted Mills, which said shares of stock stood in the names of Hans E. Stoehr and Max W. Stoehr and were represented by certain certificates (giving their numbers); and that whereas the Leipzig corporation was desirous of selling and the said New York corporation was desirous of purchasing said interest on the terms and conditions therein set forth, the instrument provides that in consideration of the premises and of \$5,000 paid by the New York company to the Leipzig company on account of the purchase price, first, that the Leipzig company sold, assigned, and transferred unto the New York company all of its interest in said shares, and that said shares of stock should be forthwith transferred upon the books of the Botany Worsted Mills and placed in the name of said New York company. By the second clause of the instrument the terms of the sale and the purchase price for said shares were to be determined as set forth, and paid in installments. It is there provided that the purchase price shall be determined by, and shall be equal to, the book value of said shares, as shown by the books of the Botany Worsted Mills, the price to be payable in five installments, the first installment to be payable one year from date and the subsequent installments in two, three, four, and

five years from date, and from the last or fifth installment, the sum of \$5,000, paid on account as thereinbefore recited, with interest at 6 per cent from date, shall be deducted.

The instrument then recites how the annual installments shall be completed, and then provision is made for the dividends declared upon the Botany Worsted Mills stock during the period. It is then by the third clause provided that the certificates of stock for said 14,900 shares, sold and transferred as thereinbefore provided, shall be placed in the possession of the Leipzig company as collateral security for the amount of the purchase price, but as each annual installment, with said additions provided for, is paid, the New York company shall have the right to require the delivery, and the Leipzig corporation will contemporaneously with the payment of such installment, redeliver to the New York company, one-fifth of the said shares, and thereupon the Leipzig company shall continue to retain the remaining shares as collateral security for the balance of the purchase price still payable. By the fifth clause of the instrument, it is provided that in the event that any of the said annual installments with such additions provided for in paragraph second, subdivision d, thereof, shall not be paid when due, then the Leipzig company shall notify the New York company in writing that it requires the payment of the installment then due, together with said additions, or in the event that the New York company shall

not within 60 days after said demand, pay said installments with the additions, then the—

said shares of stock or any remaining balance of said stock shall be forthwith retransferred to the said Leipzig company on the books of the Botany Worsted Mills and all rights on the part of the New Jersey company to said stock or any such balance shall cease and the Leipzig Company shall retain the five thousand (\$5,000) dollars, paid on account as hereinbefore recited, in full settlement of any claim against the New York company, and thereupon neither of said companies shall have any further claim against the other arising under or by reason of this agreement; it being understood that the nonpayment of any subsequent installment shall not affect the portion or portions of the stock which may have been fully paid for by a previous installment or installments. (Rec., p. 16.)

This instrument was signed in the name of the Leipzig company by Hans E. Stoehr. It was signed by Stoehr & Sons (Inc.) by George G. Röhlig, vice president, and by the appellant as secretary of the New York corporation. Within a short time after this instrument was signed war was declared between the United States and the Empire of Germany, and thereafter nothing was done under this instrument. Hans E. Stoehr at the time of the execution of the instrument was the president of the New York corporation. He was in control of both the copartner-

ship theretofore existing of Stoehr & Sons, and the corporation of Stoehr & Sons, after it was incorporated, and the Botany Worsted Mills, of which he was a director and treasurer (p. 219). He did not sign this instrument as an officer of the Leipzig corporation, nor as agent for the Leipzig corporation or in any other capacity, but just signed the name of the Leipzig corporation by Hans E. Stoehr. The Leipzig corporation, as before mentioned, was a large corporation existing in Germany. Its stock was bought and sold on the Leipzig and Berlin Stock Exchange, and it had many stockholders beside the Stoehr family. It will be noted in this instrument that nowhere does Stoehr & Son (Inc.), the New York corporation, agree to buy the shares—except the transfer of the shares—or agree to be responsible for any obligation under it. The \$5,000 provided for in the agreement was never paid to the Leipzig corporation. Hans E. Stoehr simply directed that a credit be made to the Leipzig corporation, and a charge be made against Stoehr & Sons (Inc.) on the books of the Botany Worsted Mills. No money was passed; no money was received by the Leipzig corporation.

So far as appears, the Leipzig corporation had no knowledge of this transaction. And then to prevent their being any implication of any liability of Stoehr & Sons (Inc.), the New York corporation, it is expressly provided that the price to be payable shall be paid in five installments, the first installment one year from date, and the subsequent installments two, three, four, and five years from date; and then it is

provided by a clause in the instrument that if the New York company should not pay any of the installments within 60 days after demand, then the shares of stock, or any remaining balance of said stock, shall be forthwith retransferred to the Leipzig company on the books of the Botany Worsted Mills, and that all rights on the part of the New York company to said stock, or any balance, shall cease. The Leipzig company was to have the certificates in its possession and on failure to pay any installment all rights of the New York company were to cease, and thereafter the Leipzig company was to have no further claim against the New York company. There was to be no reassignment by the New York company to the Leipzig company, which would be necessary if the title had passed by the first clause of the instrument. But all rights of the New York company were to cease. This language would be entirely intelligible if it were an option to purchase by the New York company one-fifth of the stock at each of the periods named. But taking the whole instrument together, as the court held on the trial, there was no intention to transfer the title to the stock to the New York company until the installment was paid. The formal title on the books of the Botany Worsted Mills was to be transferred to the New York corporation. But the Leipzig corporation was to hold the certificates of stock, and if the installments were not paid the rights of the New York corporation to said stock were to cease.

As a matter of fact, all these certificates were in Germany, and were never produced or canceled by the Botany Worsted Mills, and there could be no legal transfer on the books of the Botany Worsted Mills to the New York corporation. But HANS E. Stoehr, in control of all three corporations, ordered that these shares of stock should be transferred on the books of the company to Stoehr & Sons (Inc.), a New York corporation, but no certificates were ever issued to Stoehr & Sons, and there was a mere book-keeping entry. So far as appears, the Leipzig corporation knew nothing about this whole transaction, which was a transfer of its stock to a corporation of which Hans E. Stoehr was president, and in which he and his father and brothers were solely interested.

The by-laws of the Botany Worsted Mills were introduced in evidence and the provision in regard to the transfer of shares is printed at page 250, article 18. That provides that stock shall be transferable only upon the books of the company by the holder thereof in person or by his duly authorized attorney; that the holder of record of stock upon the books of the company shall be the only person whom the company shall recognize as the owner thereof. But the certificates of stock never having been delivered to the Botany Worsted Mills, and there was no action by the Leipzig company or by its attorney, there could be no valid issue of new certificates without creating an overissue of stock, and a mere notation on the books of the company that such stock had

been transferred to Stoehr & Sons (Inc.) would not make it the lawful owner of the stock or entitle it (the New York corporation) to receive the dividends or act as stockholder of the company, and the dividends subsequently paid by the Botany Worsted Mills were never paid to Stoehr & Sons (Inc.).

When this transaction was inquired into by the Alien Property Custodian, Stoehr & Sons and the Botany Worsted Mills made a report to the Alien Property Custodian. This is printed on pages 218 to 223 of the record. When these corporations reported the stockholdings of the Botany Worsted Mills (p. 221 of the record), this contract was alluded to (p. 222). It is there said that these 14,900 shares were in the name of H. E. Stoehr and M. W. Stoehr as trustee for said Stoehr & Co., the Leipzig corporation, the beneficial interest being in Stoehr & Sons; that regarding the contract for the purchase of said 14,900 shares by Stoehr & Sons (Inc.), from Stoehr & Co. of Leipzig, Germany, it has been fully explained that the control of Botany might be imperiled by a state of war, because the voting right on stock of alien enemies, or in which alien enemies had the beneficial interest (as was the case with said 14,900 shares), was doubtful under the decisions of the courts, and if deprived of the voting right the control of Botany might be lost; that the contract was made with reference to the control of Botany as between its stockholders and had, of course, no reference to the status of such control as far as the Alien Property

Custodian was concerned; that such status is not affected whether such shares are in Stoechr & Sons, the Leipzig corporation, or in Stoechr & Sons (Inc.), the New York corporation; that as before stated verbally there had been no resolution or other corporate action by Stoechr & Sons, the Leipzig corporation, in confirmation of this transaction. This report is signed by Heyn & Covington, counsel, but at the foot of the carbon copy of this report there is a formal approval of this report by Botany Worsted Mills, by Hans E. Stoechr, treasurer, and Stoechr & Sons (Inc.), by H. E. Stoechr, president.

This report is dated February 9, 1918, less than a year after the corporation was organized and the instrument in question was made. It was made under the direction of Hans E. Stoechr, who had signed the contract on behalf of the Leipzig corporation, who was president of Stoechr & Sons (Inc.) and had the control of both the Botany Worsted Mills and Stoechr & Sons (Inc.), the New York corporation. It was drawn up by the attorney who had prepared the instrument in question and was approved by both corporations, the persons controlling both corporations acting for them. This was the contemporaneous construction of the instrument in question, made by all of the parties to it and stating the intention of the parties making it. It is entirely consistent with the instrument itself, or in the absence of any obligation of the New York corporation to purchase the shares, with the right of the Leipzig corporation to terminate

the agreement, whereupon the New York corporation would lose all interest in the stock, and neither party to the agreement would have any claim or right against the other, except so far as the stock had been actually paid for. It was clearly a mere option or right to purchase the stock to justify the transfer of the shares of the stock in the name of the New York corporation, so as to provide for the voting of the stock in case there should be a contested election of the Botany Worsted Mills directors.

There is another letter from Hans E. Stoehr, dated February 5, 1918, to Mr. Heyn, who was his representative in Washington, in which he states that the majority of the stock of the Botany Worsted Mills, of Passaic, N. J., and of Stoehr & Sons (Inc.) is held by persons who are alien enemies under the Trading With the Enemy Act; that this information is given by him as treasurer of the Botany Worsted Mills and as president of Stoehr & Sons (Inc.), and the letter is signed "Hans E. Stoehr."

The stock holdings of the Botany Worsted Mills show that, without these 14,900 shares owned by the Leipzig corporation, the majority of the stock was not held by alien enemies. Thus, at the annual meeting on March 20, 1917, Stoehr & Sons (Inc.) voted 20,585 shares, which included the 14,900 shares in question, the whole number of shares being 36,000. Without these 14,900 shares there was not a majority of the stock held by alien enemies. So neither Stoehr & Sons (Inc.), nor did Hans E. Stoehr,

who had control of both corporations and who signed the instrument on behalf of the Leipzig corporation, at any time claim that Stoehr & Sons (Inc.) was the owner of this stock or had any beneficial interest in it, and neither did Stoehr & Sons (Inc.) at that time make any such claim.

When the case was tried two of the periods for which the installments were to be paid had expired, and at no time was Stoehr & Sons (Inc.) either able or willing to carry out this transaction, based upon the claim of the appellant that any interest or right was transferred to the New York corporation. The complainant Max W. Stoehr was a member of the board of directors. After the expiration of the first year, when the first installment was due, no attempt was made at any time to comply with the contract or to provide the means with which to purchase one-fifth of these 14,900 shares. All contemporaneous constructions of the agreement agree with the views expressed by the learned judge upon the trial, that this instrument did not, and was not intended to, convey to the New York corporation the title to these shares of stock, but was a mere device to keep the voting power of a majority of the stock in the hands of the Stoehrs during the war.

POINT V.

The contract between the Leipzig corporation and Stoehr & Sons (Inc.), having been made in contemplation of the declaration of war between the United States and the German Empire, the provisions thereof providing that the German enemies of the United States were to have the custody of the shares of stock therein provided for and were to receive all the consideration to be paid therefor, to carry out the contract, it was within the definition of "trading with the enemy", and was therefore unlawful after the declaration of war.

By subdivision c of the second section of the Trading With the Enemy Act, it is provided that the words "to trade" shall be deemed to mean "enter into, carry on, complete, or perform any contract, agreement, or obligation." And by subdivision e, "to have any form of business or commercial communication or intercourse with." And by section 3 it is provided that it shall be unlawful for any person in the United States to trade or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, another person, with reasonable cause to believe that such other person is an enemy or an ally of an enemy, or is conducting or taking part in such trade, directly or indirectly, for or on account of or on behalf of, or for the benefit of an enemy or ally of an enemy. By section 2 of said Act the word "enemy" is defined as being any individual, partnership, or other body of individuals resident within the territory, or resident outside of the United

States, doing business within said territory, and any corporation incorporated within said territory with which the United States is at war.

Subdivision b of section 7 provides that no conveyance, transfer, delivery, payment, or loan of money or other property, in violation of section 3 of the Act, made after the passage of the Act, shall confer or create any right or remedy in respect thereto. And subdivision b of section 8 of the Act provides that every contract entered into prior to the beginning of the war, between any citizen of the United States or any corporation organized within the United States, and an enemy or ally of an enemy, the terms of which provide for the delivery during or after any war in which an enemy or ally of an enemy nation has been, or is now, engaged, or anything produced, mined, or manufactured in the United States, may be abrogated by such citizen or corporation.

It was thus made unlawful when that Act was passed to carry out, complete, or perform any contract, agreement, or obligation, or buy, sell, transfer, assign, or otherwise dispose of, or receive, any form of property. This contract was made in contemplation of war between the United States and Germany. (See report of Stoehr & Sons (Inc.) and Botany Worsted Mills to Alien Property Custodian, Rec. 220.)

By the contract itself the terms of sale and the purchase price of said shares were to be determined by and be equal to the book value of said shares, as

shown by the books of the Botany Worsted Mills; and the price was to be payable in five installments, the first installment to become payable one year from date, and the subsequent installments, respectively, in two, three, four, and five years from date. Thus the installment for the whole purchase price of the stock was to be paid after war was declared between the United States and the German Empire, and the certificates were to be held by, and were held by, the Leipzig corporation, and these certificates were not to be delivered until the payment of one of the five installments, which was not to be payable until one year from the date of the instrument. By the Trading With the Enemy Act it was made unlawful to carry out, complete, or perform such a contract, or to buy, sell, transfer, assign, or otherwise dispose of, or receive, any form of property, and the right of the Leipzig corporation to receive any payment under this contract or to transfer, sell, or deliver to the New York corporation any of its property in its possession was lost, and a penalty of \$10,000, or 10 years in prison, was imposed upon any person doing this unlawful act. Thus this contract was expressly dissolved when the war was declared between the United States and the Empire of Germany.

In *New York Life Insurance Co. v. Statham* (93 U. S., p. 24) the claim made was that when the performance of a condition becomes illegal, in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war and

to have been revived with all its force when the war ended. The court in the case of a contract of life insurance refused to apply that rule, saying (p. 32):

The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and can not be invoked to revive a contract which it would be unjust or inequitable to revive.

Here the contract was executory. It was clearly the intention of the parties that the title, both legal and beneficial, would not vest until the money was paid by the New York corporation to the Leipzig corporation. The certificates of stock were never delivered to the New York corporation, but were held in Germany, and the New York corporation was not to be vested with the title to the stock until it paid for the same by the annual payments. The whole beneficial interest in the stock was retained by the Leipzig corporation. It had possession of the stock, or the certificates representing the stock, which were not to be delivered to the New York corporation until the payments were made. It became unlawful on the passage of the Trading With the Enemy Act to make such payments. The rights of the Leipzig corporation were confiscated to the United States under the Trading With the Enemy Act, and whatever rights existed in the Leipzig corporation passed to the Alien Property Custodian. He could not enforce the contract, because by its terms the New York corporation was not bound to pay any install-

ment, and if it did not pay any of the installments its right to the stock ceased and determined.

Appellant sues as a stockholder of the New York corporation to enforce the claim that the New York corporation had that this stock was its property. He was the owner of but 44-25/100 shares of the stock of the New York corporation. The New York corporation had resolved that it would not comply with the contract, and it is clear from the evidence that it was incapable of furnishing the money that was necessary to complete the purchase of the stock. The New York corporation had only the right to possession of the stock on paying the installments when they fell due. The Leipzig corporation has never insisted upon the completion of the contract. By the express terms of the contract, if the installments were not paid when due and if the contract was not completed (by the fifth provision of the contract) "neither of said companies shall have any further claim against the other arising under or by reason of this agreement; it being understood that the nonpayment of any subsequent installment shall not affect the portion or portions of the stock which may have been fully paid for by a previous installment or installments." Rec., p. 16. No installment had been paid and the \$5,000 recited in the agreement had not been actually paid by the New York corporation. There was merely a bookkeeping entry on the books of the Botany Co., charging the New York corporation with the \$5,000 and crediting the German corporation with that amount. That the New York corpo-

ration would be entitled to have this bookkeeping entry canceled and that the New York corporation would be entitled to receive from the Botany Mills Co. any amount standing to its credit, irrespective of this bookkeeping entry, is not involved.

The contract for the sale was thus entirely executory. Construing this contract as an absolute sale of the property, war was threatened between the United States and the German Empire, and when the Trading With the Enemy Act was passed it was unlawful to carry it out. The property of the Leipzig company was confiscated by the United States, and the custodian took possession of it. The contract by its terms provided that neither party should have any recourse against the other if the installments were not paid at the time when they were to be paid, and thus the contract was actually terminated. Its execution was unlawful and the custodian was entitled to the stock as enemy owned stock and discharged from the illegal contract. But as the court below held, in view of the contemporaneous construction of the contract as disclosed by the evidence, and the situation of the parties at that time "all that was accomplished, and in my opinion all that was desired, was to secure the firm against dissolution in the event of war, and to insure the voting right in two Americans on whom Hans could rely, if his own right to vote on the shares became affected by his enemy character." (Rec. 313.)

But whatever construction is given to the contract, it has been the uniform holding of this court that

when war threatens, transactions respecting property which would in the event of war be subject to capture are unflinchingly and exhaustively scrutinized by the courts and with grave suspicion. Nothing short of an absolute acquisition of complete dominion of the property the *jus in rem* or *jus in re*, as distinguished from *jus ad rem*, in the utmost good faith and established by convincing proof will support a claim.

The Carlos F. Roses, 177 U. S. 655.

The Benito Estenger, 176 U. S. 568.

The Frances, 8 Cranch, 359.

A transfer of property when war is imminent is held not to be good, if subject to any condition, or even tacit understanding, by which the vendor keeps an interest in the property, or in its profits, or a control over it, or power of revocation, or a right to its restoration at the conclusion of war.

The Benito Estenger, 176 U. S. 568.

If the risk of loss be in the enemy and this is conclusive.

The Venus, 8 Cranch, 253.

The Frances, 8 Cranch, 359.

If the purchaser has the option to pay for the property or not. If the purchaser is unable to pay for the bargain.

The contract in question did not comply with any of these conditions. The property remained in the hands of the Leipzig company. The condition as to payment was entirely optional with the New York corporation.

POINT VI.

The contract is void and unenforceable because Hans E. Stoehr, who attempted to execute the agreement on behalf of the Leipzig company, was the president and interested in the New York company, and thus occupying a fiduciary relation to the Leipzig corporation, was transferring to a corporation of which he was president and in which he had an interest, the property of the Leipzig corporation.

As we have before argued in this brief, under the Trading With the Enemy Act and the demand made by the custodian, all rights of the Leipzig company in relation to these 14,900 shares of the Botany Worsted Mills had vested in the custodian. Any right that the Leipzig company had to void this contract and to resist its enforcement vested in the custodian. If this contract was void as against public policy, or void for any other reason, or voidable on the election of the Leipzig company, this right vested in the custodian. With the custodian under the authority of the Act and the delegation of power to him by the President, determined that this property was owned by the Leipzig corporation, and seized it for the use of the United States, he expressly disaffirmed any right to, or title in, the property under this contract. Both the Botany Worsted Mills and Stoehr & Sons (Inc.) and Hans E. Stoehr and the appellant had notice of the claim by the custodian, and were heard by him. In the statement made on behalf of Stoehr & Sons (Inc.) it was stated that "we also stated verbally there have been

no resolutions or other corporate action" by the Leipzig corporation in confirmation of this transaction. (Rec. 222.)

That fact being before the custodian, he had the right to disaffirm the contract and take possession of the stock as the property of the Leipzig corporation. There is no claim in the bill, nor was there any proof on the trial, that Hans E. Stoehr had any express authority from the Leipzig corporation to transfer the stock to the company of which he was the president and in which he had an interest. No such authority could be given, because the New York corporation was organized only the day before the execution of the agreement claiming to transfer the stock to the New York corporation. Hans E. Stoehr thus assumed to act as the agent or representative of the Leipzig corporation. He made the contract which it is claimed transferred these 14,900 shares of stock, valued at millions of dollars, to the company of which he was president and in which he and his family only were interested without providing for any consideration to be paid for the stock, except at the option of the New York corporation, at various periods, five years in the future, with a provision that there was to be no liability on behalf of the New York corporation if it failed to perform the so-called contract.

The law of England and the United States has always been that such a transaction is void, both as against public policy and violation of the rights of the beneficiary, and nowhere has this practice been

more universally condemned than in the Federal courts.

In *Marsh v. Whitmore* (21 Wallace, 178), it is said (p. 184):

The law, therefore, wisely prohibits a party selling on another's account from becoming a buyer on his own at the sale, and will always condemn transactions of that character whenever their enforcement is attempted. The complainant could have treated the purchase made by the defendant as a nullity. He could have insisted that the relation of the defendant to the property was not changed by the proceeding, and that he stood charged with the same trust respecting it with which he was charged previously.

In *Wardell v. Railroad Co.* (103 U. S. 651), a contract was made with defendant railroad company under which the plaintiff was to share in the profits. In that case a judgment refusing to enforce the contract or allow the plaintiff to have any benefit under it was affirmed. The court held that such a contract was indefensible and illegal and that the directors constituting the executive committee of the board were clothed with power to manage the affairs of the company for the benefit of the stockholders and creditors; that their character as agents forbade the exercise of their power for their own personal ends against the interest of the company. The court then said (p. 658):

It is among the rudiments of the law that the same person can not act for himself and

at the same time, with respect to the same matter, as the agent of another whose interests are conflicting.

And subsequently, the court, after quoting *Marsh v. Whitmore* (21 Wallace, 178), said (p. 658):

Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They can not, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits. Hence all arrangements by directors of a railroad company, to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration.

See also case of *Davis v. Las Ovas Company (Inc.)*,
227 U. S. 80.

An extremely interesting case is *Munson et al. v. S. G. & C. R. R. Co. et al.* (103 N. Y., 58). In that case the officers and directors of a corporation carried through its board of directors a resolution providing for a contract which was for the benefit of the directors against the corporate interest. At page 73 the court said:

But we are of opinion that the contract of September 14, 1875, is repugnant to the great rule of law which invalidates all contracts made by a trustee or fiduciary, in which he is personally interested, at the election of the party he represents. * * * The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. * * * The law can not accurately measure the influence of a trustee with his associates, nor will it enter into the inquiry, in an action by the trustee in his private capacity, to enforce the contract in the making of which he participated. The value of the rule of equity, to which we have adverted, lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of trus-

tees, by vitiating, without attempt at discrimination, all transactions in which they assume the dual character of principal and representative.

The same principle is established in *Billings v. Shaw* (209 N. Y., 265), in which it is said that such a contract with a third person is not made valid, although the acts of the unfaithful agent may have in fact resulted in benefit to his principals. *Lum v. McEwen*, 56 Minn., 278. Nor by the fact that the unfaithful director of the corporation informed his codirectors of his corrupt bargain.

See also—

Continental Securities Co. v. Belmont, 206 N. Y. 7.

Brooklyn Heights R. R. Co. v. Brooklyn City Railway Co., 151 N. Y. App. Div., 465.

Hans E. Stoehr, assuming to act as an agent or representative of the Leipzig company, made a contract with the New York company, of which he was president and a stockholder, to transfer from the Leipzig corporation to the New York corporation 14,900 shares of the stock of the Botany Mills, worth over \$5,000,000, on the payment of \$5,000, which was never actually paid. He engineered the whole transaction and made a pretense of payment by crediting the Leipzig corporation with \$5,000 on the books of the Botany Mills, and charging it against the New York corporation, and now plaintiff seeks to enforce that transaction as a valid sale of \$5,000,000 worth of stock on a pretended payment of \$5,000, and

without having paid, or offered to pay, or expressing its willingness or ability to pay, the consideration prescribed in the so-called contract. To appeal to a court of equity to enforce that contract as against the principal of Hans E. Stoehr or its successor in interest violates the whole principle upon which courts of equity deal with contracts made under such circumstances.

POINT VII.

Appellant can not maintain this suit as a stockholder of the New York corporation to enforce the right of the corporation.

By the Twenty-seventh Equity Rule of Practice for the courts of equity in the United States it is provided that every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded upon rights which may properly be asserted by the corporation—

must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law * * *. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons, for not making such effort.

The only allegation in the bill is that of the eighteenth paragraph alleging that on November

20 appellant protested to the custodian against the proposed sale of the shares of stock. On November 23, 1918, appellant filed with the custodian his notice of claim under section 9 of the Trading With the Enemy Act, but that his protest was ignored; that the said defendant directors of said Stoehr & Sons (Inc.) are the creatures of and were nominated and elected by and through the orders of the said defendant, A. Mitchell Palmer, custodian, and to carry out his instructions, and that it would be useless to make demand upon said defendant directors to institute suit, and that for such reason he is obliged to appeal for relief to a court of equity.

It is settled law that the mere fact that the directors were elected by stockholders against whom a cause of action is sought to be enforced is not sufficient to justify a stockholder from failing to secure action by the board of directors or other managing officers of the corporation.

Mr. Palmer as custodian was acting as an officer of the United States to carry out the law of Congress. He had no personal interest in the transaction; no judgment against him could affect him personally; and certainly the mere fact that he had voted for the directors as the holder of stock which had come into his hands as the property of an enemy alien was no reason why the directors should not bring an action if they had been requested to do so, and it was a proper action to bring.

Mr. Palmer was examined as a witness for the defendant. He disclaimed any attempt to influence

the directors in the administration of the trust, and there is not the slightest particle of evidence to show that he ever did influence them, or that the refusal of the directors to sue on behalf of the New York corporation was anything but an exercise of their best judgment and for the benefit of the New York corporation, its creditors and stockholders.

Post v. Buck Stove & Range Co., 200 Fed. Rep., 918.

This was an action by a minority stockholder of a corporation to enforce a claim in favor of the corporation.

In *O'Connor v. Va. P. & P. Co.* (184 N. Y., 46), at page 53, the Court of Appeals expressly held that the allegation that—

the new directors were “subservient to the domination and dictation of said Frank Jay Gould and Helen Miller Gould” [was not] sufficient to prove that they would not prosecute against the Goulds a well-founded cause of action. It is not necessarily through dishonest or improper motives that persons may be subject to the domination and dictation of others. If the directors were the same as those who committed the wrongs, or if they were acting fraudulently, dishonestly or collusively with the Goulds for the purpose of defrauding the corporation in the latter’s interest, it was very easy to say so and there is no reason why the charge should not be explicitly and unequivocally made.

In *Heinz v. National Bank of Commerce* (237 Fed. Rep., 942) the same rule is applied.

See also *Brewer v. Boston Theatre*, 104 Mass., 378.

But the evidence in this case shows that whether or not the directors should enforce this so-called contract was a fair question for determination by the directors of the company, and it is settled that a court of equity, where a fair question is presented, will not overrule the discretion of directors made in good faith.

In 10 Cyc. 965-967 the question is discussed. The general rule is stated at paragraph 12, page 969, that equity will not interfere on questions of corporate management or policy. The true distinction is between acts in excess of the powers of directors and in breach of their trust and acts which are within their powers and which merely involve an exercise of the discretion committed to them. And in 10 Cyc., paragraph 7, page 965, it is said that if the directors are guilty of a breach of trust injurious to the corporate property or to the rights of the shareholders, or a portion of them, and if the corporation refuses to institute the proper proceedings to restrain or redress such injury, one or more of the shareholders may do it in their individual names.

In order that this jurisdiction may be invoked in cases not governed by statute, there must ordinarily occur: (1) The matter complained of must be a breach of duty on the part of the directors, (2) the corporation must fail or refuse to demand redress, and (3) there must be an injury to the shareholder.

In 7 Ruling Case Law at page 331, section 308, the same question is discussed. It is there said that corporations represent their stockholders in all matters within the scope of their corporate powers, and this is true respecting litigation as well as other matters. Stockholders can not ordinarily maintain a suit to enforce any right of the corporation. The privilege belongs to the corporation itself, acting through its directors, and the mere failure of the directors to bring suit does not entitle any stockholder to do so.

See also 7 Ruling Case Law, pages 491, 492, section 473, where it is said that a very wide discretion is necessarily reposed in the directors of a corporation and that it is not the duty of the managers of such association to bring suit upon every supposed wrong or injury to the corporation.

See also Fletcher's Cyc. on Corporations, vol. 6, section 4065, where the rule is particularly well stated. It is there said:

So long as they [the directors] act, not fraudulently, illegally or oppressively, but in good faith, in the exercise of their discretion, and for what they deem to be the best interests of the company, a court of equity has no jurisdiction to interfere at the suit of a dissenting stockholder or a dissenting minority of the stockholders. Such a suit can not be maintained by showing mere mistake or error of judgment on the part of the directors or majority of the stockholders. Their conduct must be *ultra vires*, illegal, fraudulent or oppressive.

And the court is asked to read this whole section and the authorities cited under it.

See also sections 4066 and 4075.

The same principle is the settled law of the State of New York.

See *Leslie v. Lorillard*, 110 N. Y., 519, where it is said the courts will not interfere unless the powers of the directors have been illegally or unconscientiously executed, or unless it be made to appear that the acts were fraudulent or collusive or destructive of the rights of the stockholders.

In *Hawes v. Oakland* (104 U. S., 450), a leading case on the subject in the United States, the question is discussed, and it was there held that to enable a stockholder of a corporation to sustain in a court of equity in his own name a suit founded on a right of action existing in the corporation itself, there must exist as the foundation for the suit some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other sources of organization, or such a fraudulent transaction completed or contemplated by the acting managers in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation or to the interest of the other shareholders, or where the board of directors or majority of them are acting for their own interest in a manner destructive of the corporation itself, or of the rights of the other shareholders. And the limita-

tions of minority stockholders to enforce a claim of the corporation are illustrated in the cases of—

Fleitmann v. Welsbach Co., 240 U. S., 27;
and

United Copper Co. v. Amalgamated Copper Co., 244 U. S., 261.

In the latter case the court said (pp. 263, 264):

Courts interfere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment; and, as a rule, only after application to the stockholders, unless it appears that there was no opportunity for such application, that such application would be futile (as where the wrongdoers control the corporation), or that the delay involved would defeat recovery.

In the present case it appears from the evidence that the directors considered the question of attempting to enforce this contract. They took the advice of counsel on the question as to whether the contract was enforceable, and that advice was asked for at the time that the plaintiff was a member of the board of directors, and he made no request that the contract be enforced. Counsel for the company reported that the contract was not enforceable and that it was not to the interest of the corporation to enforce it, and the directors, considering the whole question, determined, in the absence of any requests from any stockholder to enforce the contract, that

it was for the best interest of the corporation of which they were directors not to attempt to recover the stock. This question was clearly one of sound business judgment of the directors. To recover the stock it would be necessary to pay at the time two installments of substantially a million dollars each, and a third installment would be due within a few months. The corporation had no money to pay these installments and it has not been suggested by the evidence or by the counsel for the plaintiff how the money could be obtained. It must be clear to the court that it would not be to the benefit of the New York company, with its capital of \$250,000, to undertake to pay the large amount involved in an attempt to enforce this so-called contract.

For the benefit of the German stockholders it might be of advantage to prevent the sale of the property until after peace was declared. But this court is not solicitous to prevent the United States, from recovering this \$5,000,000, which will be the result of the sale of this stock for the United States, and hold it over for these German stockholders, who, after peace is declared, could merely demand from the New York company the payment of the installments, then abrogate the contract and repossess themselves of the stock. Viewing it in the interest of the New York corporation itself and its creditors and stockholders, certainly the court can not say that it was so clearly to the benefit of the corporation to enforce the so-called contract, if it was enforceable, as to indicate fraud or bad faith on the part of the directors when

they determined it was not for the benefit of the New York corporation to enforce it.

It is submitted that the appellant has failed to prove any fact that would justify the court in entertaining a bill by a minority stockholder to enforce this cause of action which it is claimed exists in favor of the New York corporation.

Conclusion.

The judgment appealed from should be affirmed.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

GEORGE L. INGRAHAM,
Of Counsel.

DECEMBER, 1920.



SUPREME COURT OF THE UNITED STATES.

No. 546.—OCTOBER TERM, 1920.

Max W. Stoehr, Appellant, vs. Francis P. Garvan, Alien Property Custodian, et al.	} Appeal from the District Court of the United States for the Southern District of New York.
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[February 28, 1921.]

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit to establish a claim to and prevent a sale of 14,900 shares of the capital stock of the Botany Worsted Mills, a New Jersey corporation, which were seized by the Alien Property Custodian under the Trading with the Enemy Act as the property of a German corporation called Kammgarnspinnerei Stoehr & Co., Aktiengesellschaft. The plaintiff is a citizen of the United States, residing in New York, and sues in the right of Stoehr & Sons, Inc., a New York corporation, of which he is a stockholder, his asserted justification for so suing being that the directors of the corporation are agents of the Alien Property Custodian and so far under his control that it would be useless to request them to bring the suit.

The grounds for relief urged in the bill are that the shares, although seized and proposed to be sold as the property of the German corporation, are in truth the property of the New York corporation; that, even if it does not own them, it has a substantial interest in them under a pre-war contract between it and the German corporation; that the shares cannot be taken from it consistently with due process of law as guaranteed by the Fifth Amendment, save through a judicial proceeding wherein it has a right and an opportunity to be heard; that the shares were seized and are about to be sold without any such proceeding or hearing, and in violation of subsisting treaty provisions; and that the seizure as made did not conform to designated provisions of the Trading

with the Enemy Act, and the sale as proposed will not be in accord with other provisions of the Act.

After a full hearing the District Court overruled the objections urged against the initial seizure; found from the proofs that the German corporation was the beneficial owner, that the New York corporation had no actual interest in the shares, and that the contract between those corporations, stressed by the plaintiff, "was not intended to represent the real purpose of the parties at all, but to serve as a cover for another purpose"; and as a result of the findings the court held that neither the plaintiff nor his corporation was entitled to any relief, and accordingly dismissed the bill. The plaintiff then asked and was allowed a direct appeal to this court. His assignments of error cover all the grounds on which the seizure and proposed sale were attacked in the bill.

We shall assume, as did the District Court, that a stockholder may bring a suit such as this in the right of his corporation, where there are circumstances justifying such representative action, and that the plaintiff has shown sufficient reason for suing in that capacity. See Eq. Rule 27, 226 U. S., Appendix, p. 8.

The Trading with the Enemy Act, whether taken as originally enacted, October 6, 1917, c. 106, 40 Stat. 411, or as since amended, March 28, 1918, c. 28, 40 Stat. 459, 460; November 4, 1918, c. 201, 40 Stat. 1020; July 11, 1919, c. 6, 41 Stat. 35; June 5, 1920, c. 241, 41 Stat. 977, is strictly a war measure and finds its sanction in the constitutional provision, Art. I, § 8, cl. 11, empowering Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." *Brown v. United States*, 8 Cranch 110, 126; *Miller v. United States*, 11 Wall. 268, 305.

It is with parts of the act which relate to captures on land that we now are concerned. They invest the President with extensive powers respecting the sequestration, custody and disposal of enemy property. By § 5 he is in terms authorized to exercise "any" of these powers "through such officer or officers as he shall direct." By § 6 he is authorized to appoint and "prescribe the duties of" an officer to be known as the Alien Property Custodian. By § 7c, as amended November 4, 1918, direct provision for sequestering enemy property is made as follows:

"If the President shall so require any money or other property including . . . choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

"Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

By § 9, as twice amended, any one, "not an enemy or ally of enemy", claiming any interest, right or title in any money or other property so sequestered and held may give notice of his claim and institute a suit in equity against the Custodian or the Treasurer, as the case may be, to establish and enforce his claim; and where suit is brought the money or property is to be retained by the Custodian or in the Treasury to abide the final decree. By § 12, as amended March 28, 1918, the Custodian is clothed

with "all the powers of a common-law trustee" in respect of all enemy property coming into his hands and is given authority, subject to the President's supervision, to manage and dispose of the same, by sale or otherwise, as if he were the absolute owner, save as the power of disposal may be suspended by a suit under § 9. As respects the ultimate disposition of the property or its proceeds § 12 says: "After the end of the war any claim of an enemy or of an ally of enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury shall be settled as Congress shall direct."

The President, by orders of October 12, 1917, and February 26, 1918, committed to the Alien Property Custodian the executive administration of § 7c, including the power to determine after investigation whether property was enemy-owned, etc., and to require the surrender or seizure of such as he should determine was so owned. In exercising this power the Custodian after investigation determined, in substance, that the shares now in question, which then stood in the name of the New York corporation on the books of the Botany Worsted Mills, belonged to the German corporation, that it was an enemy not holding a Presidential license, and that the New York corporation held the shares for its benefit; and in further exercising this power the Custodian seized the shares and required the Botany Worsted Mills to transfer them to his name on its books in accordance with the provision in § 7c before quoted.

One objection urged by the plaintiff is that the seizure permitted by the Act is confined to money or property "which the President after investigation shall determine" is enemy-owned, etc., and that here there was no such determination by the President, but only by the Custodian. Whether the objection would be good if it turned entirely on the words of § 7c, on which the plaintiff relies, we need not consider; for they obviously are qualified and explained by § 5, which very plainly enables the President to exercise his power under § 7c "through such officer or officers as he may direct." By the orders already noticed the President directed that this power be exercised through the Alien Property Custodian. It therefore is as if the words relied on had been "which the President, acting through the Alien Property Custodian, shall determine after investigation" is enemy-owned, etc. In short, a

personal determination by the President is not required; he may act through the Custodian, and a determination by the latter is in effect the act of the President. *Central Union Trust Co. v. Garvan*, ante, —; *The Confiscation Cases*, 20 Wall. 92, 109.

The plaintiff further objects that the shares, although claimed by and standing in the name of the New York corporation, which concededly was neither an enemy nor an ally of an enemy, were seized and transferred to the name of the Alien Property Custodian in virtue of a determination by an executive officer as an *ex parte* administrative proceeding that they belonged to an alien enemy,—the gist of the objection being that the shares could not be taken from the New York corporation consistently with due process of law without first according it a hearing on its claim in a court of justice. The objection rests on erroneous assumptions and is not tenable.

That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy-owned, if adequate provision be made for a return in case of mistake, is not debatable. *Central Union Trust Co. v. Garvan*, supra. There is no warrant for saying that the enemy ownership must be determined judicially before the property can be seized; and the practice has been the other way. The present act commits the determination of that question to the President, or the representative through whom he acts, but it does not make his action final. On the contrary, it distinctly reserves to any claimant who is neither an enemy nor an ally of an enemy a right to assert and establish his claim by a suit in equity unembarrassed by the precedent executive determination. Not only so, but pending the suit, which the claimant may bring as promptly after the seizure as he chooses, the property is to be retained by the Custodian to abide the result and, if the claimant prevails, is to be forthwith returned to him. Thus there is provision for the return of property mistakenly sequestered; and we have no hesitation in pronouncing it adequate, for it enables the claimant, as of right, to obtain a full hearing on his claim in a court having power to enforce it if found meritorious.

That the shares were transferred to the Custodian's name does not affect the question, for, considering the nature of the property, that was but an incident of an effective seizure and, if a return of the shares were ordered, a re-transfer would follow as of course.

Treating this as a suit under § 9,—the plaintiff having filed a notice of claim under that section,—the next question is, has the New York corporation such an interest in the shares as entitles it, or the plaintiff in its right, to demand that they be freed from the seizure. Whether it has any interest turns on the effect to be given to the contract between it and the German corporation, under which the plaintiff insists it became the owner or acquired a substantial interest. The District Court, as we have indicated, found that the contract was not intended to affect the ownership as between the two corporations, but to serve as a cover for something else, and that after the contract the German corporation remained, as it had been before, the sole beneficial owner. The facts bearing on the question are as follows:

At the beginning of the World War and during its early stages the Stoehr family, consisting of a father and three sons, were engaged in business in New York as copartners under the name of Stoehr & Sons. The father and one son were German subjects residing in Germany; one son, Hans E. Stoehr, was a German subject residing in the United States, and the remaining son, Max W. Stoehr, was a naturalized citizen of the United States residing therein. All were shareholders in the German corporation and the father and son in Germany were among its chief officers. All were directors of the Botany Worsted Mills, and Hans E. Stoehr and Max W. Stoehr were directing and controlling its affairs, one being its treasurer and the other its secretary. It was a manufacturing concern with large holdings, had a well-established and extensive business, had been paying large dividends and gave promise of continuing to do so. The German corporation acquired the 14,900 shares in that company long prior to the war, and in 1915, after the war became flagrant in Europe, transferred them to Hans E. Stoehr and Max W. Stoehr to be held in trust for it as the beneficial owner. Stoehr & Sons, the copartnership, also had 5,690 shares in that company, and these with the 14,900 constituted a majority of its stock.

Diplomatic relations between the United States and Germany were severed February 3, 1917, and, as was commonly understood, war between them was then imminent. The Stoehrs took that view and began to adjust their affairs accordingly. They caused the

New York corporation to be organized, and on February 19, 1917, transferred to it the entire assets and business of their copartnership, taking in exchange all of its capital stock and putting the same in a five-year voting trust as a means of protecting and preventing a severance of their interests. On the following day, February 20, 1917, the contract relating to the 14,900 shares in the Botany Worsted Mills was made and the shares were immediately transferred on its books to the name of the New York corporation. In that transaction Hans E. Stoechr acted for the German corporation and the directors of the New York corporation for it,—the directors being Hans E. Stoechr, Max W. Stoechr, George G. Roehlig and Alfred de Liagre, the last two being relatives of the Stoechrs. The attorney who had advised and assisted them in transferring the copartnership assets and business also advised and assisted them in this. The shares were worth approximately \$5,000,000; and yet the initial payment was only \$5,000, and even that was paid by mere book entries. The full stipulated price was the book value of the shares, with good will and other intangible assets eliminated, and was payable in five future annual instalments. The stock certificates, transferred as just stated, were left in the custody of the German corporation as collateral security. If payment was not made when due, nor within sixty days after demand, the shares were to be re-transferred, the \$5,000 was to be retained by the German corporation and neither corporation was to have "any further claim against the other" by reason of the contract. Possibly the stipulated price was less than the actual value; but, however this may have been, the assets and situation of the New York corporation were such that it reasonably could not have been expected to make the required payments.

After the contract the dividends accruing on the shares were not paid to the New York corporation, but were credited to it in a "special" account on the books of the Botany Worsted Mills, this being directed by Hans E. Stoechr, president of the former and treasurer of the latter.

War was declared by Congress April 6, 1917, 40 Stat. 1; and the Trading with the Enemy Act was passed October 6th following. Up to the latter date no preparation was made for making the first payment under the contract although it was to be about \$1,000,000. Under the Act it became the duty of every domestic corporation to

report fully whether it owed any money to or held any property for an enemy, and also whether any of its shares were owned by or held for an enemy. In the report of the New York corporation, signed by Max W. Stoehr, the 14,900 shares covered by the contract were not reported as held for the German corporation, nor was the stipulated price or any part thereof reported as owing to that corporation. But in the report of the Botany Worsted Mills, signed by Thomas Prehn, it was said that that company had "reason to believe" that the German corporation had an interest in the shares. This led to an insistent call for full information and resulted in some correspondence and several conferences at the Alien Property Custodian's office, in all of which Herbert Heyn represented the New York corporation and the Botany Worsted Mills,—he being the attorney who had advised and assisted the Stoehrs in adjusting their copartnership affairs and in making the contract. February 5, 1918, while Heyn was attending one of the conferences, Hans E. Stoehr, as president of the New York corporation and treasurer of the Botany Worsted Mills, sent to him, for use at the conference, a list of the latter company's stockholders, in which the German corporation was described as having 14,900 shares and the New York corporation as having only 5,685. In an accompanying letter he said, "the majority of the stock of the Botany Worsted Mills . . . is held by parties who are alien enemies",—a statement which was true if the 14,900 shares belonged to the German corporation, and not true if they belonged to the New York corporation. Four days later Heyn, with the approval in writing of Hans E. Stoehr as such president and treasurer, wrote to the Alien Property Custodian, saying of the purpose with which the New York corporation was formed: "The immediate occasion for the organization of the corporation in February, 1917, was this: It was assumed that if there was a declaration of war between the United States and Germany, the partnership [of Stoehr & Sons] would probably have to cease, being dissolved by reason of the alien enemy character of Eduard Stoehr, the father, and Geo. Stoehr, the brother, the results of such dissolution being of course obviously unfortunate and conceivably disastrous"; and saying of the 14,900 shares: "Regarding the contract for the purchase of said 14,900 shares by Stoehr & Sons, Inc., from Stoehr & Co., of Leipzig, Germany, it has

been fully explained that the control of Botany might be imperiled by a state of war, because the voting right on stock of alien enemies or in which alien enemies had the beneficial interests (as was the case with said 14,900 shares) was doubtful under the decisions of the courts, and if deprived of the voting right, the control of Botany might be lost. This contract was made with reference to the control of Botany as between its stockholders and had of course no reference to the status of such control so far as the Alien Property Custodian is concerned. Such status is not affected whether such shares are in Stoeck & Co., the Leipzig corporation, or in Stoeck & Sons, Inc., the New York corporation. . . . While Botany is managed in this country, considerably more than a majority of its stock is controlled by alien enemy interests."

Max W. Stoeck, the plaintiff, was a director and the secretary of the New York corporation from the time it was organized until October 14, 1918. He participated in making the contract relating to the 14,900 shares and signed it as secretary. The shares were seized in April, 1918, and he knew of the seizure. The other directors at that time were new. He regularly attended their meetings, but did not suggest to them that the corporation had an interest in the shares. At a meeting in August, 1918, an attorney who had been looking into the contract made an oral report, in the course of which he called in question the purpose with which the contract was made and said it "would not hold water." Max W. Stoeck, although present, said nothing in support of the contract. Not until he ceased to be an officer of the corporation did he manifest any opposition to the seizure. His only explanation of his silence while he remained a director is that he feared he would lose that position if he took any other course.

The District Court, after reviewing the proofs at length, concluded that the contract was not prompted by commercial motives, nor based on an estimate of mutual advantages, and was not intended as a genuine business transaction, but was made to avoid inconveniences which otherwise might ensue from a state of war; and that the parties intended to leave the beneficial ownership in the German corporation and not to pass it to the New York corporation. We reach the same conclusion. On no other theory can the acts of those who were concerned be explained or their declarations reconciled. The mere recitation of the facts makes this so plain that we refrain from any special discussion of them.

The treaty provisions relied on (Article 23 and 24, 8 Stat. 174) relate only to the rights of merchants of either country "residing in the other" when war arises, and therefore are without present application.

Of the objections specially directed against the proposed sale, it is enough to observe that as the New York corporation does not own or have any interest in the shares it is not in a position to criticise or attack the sale; and of course a stockholder suing in its right is in no better position.

Decree affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.

